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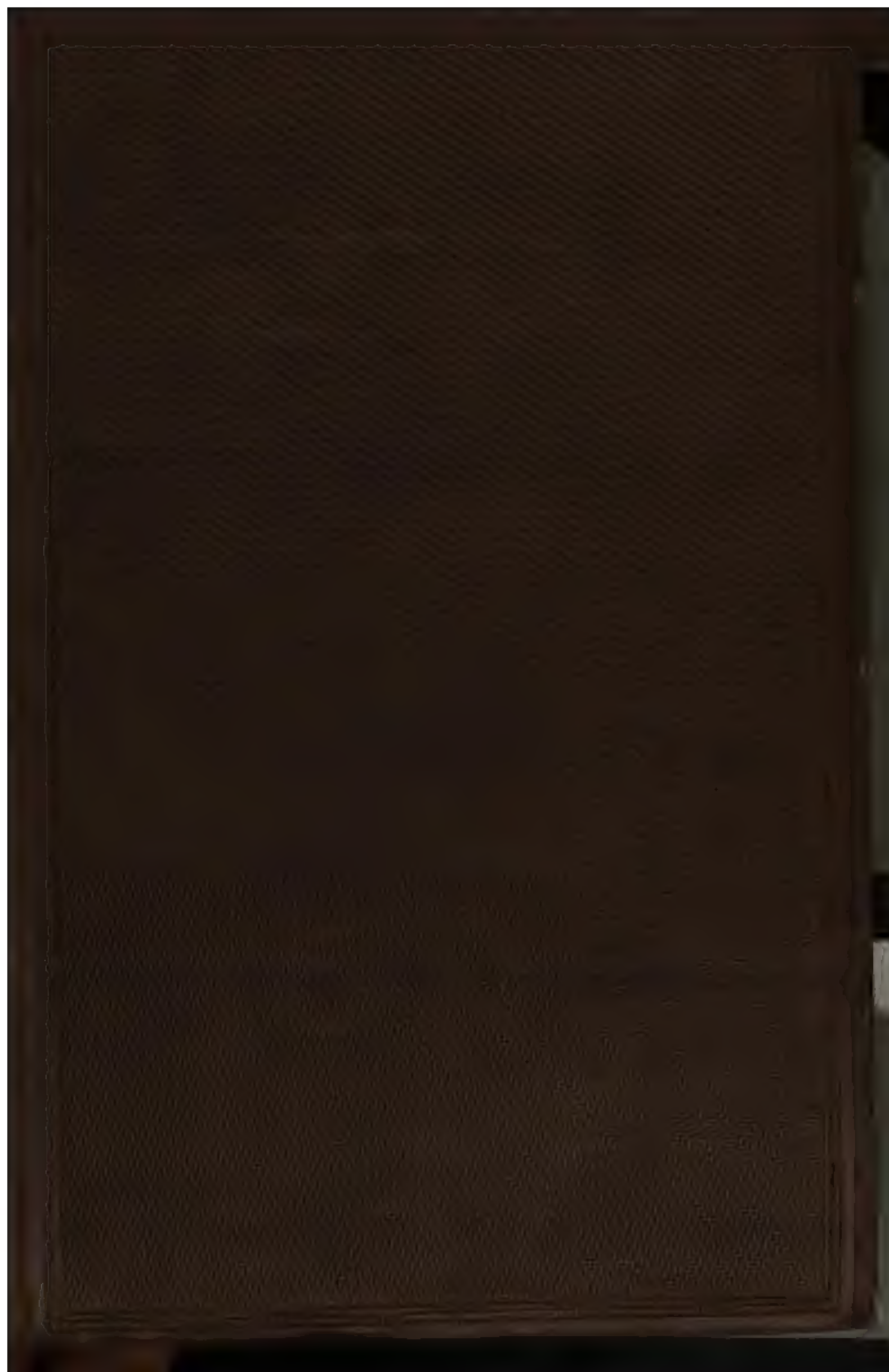
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THE
LAW AND PRACTICE
OF
ELECTION COMMITTEES;
BEING THE COMPLETION OF
A MANUAL
OF
PARLIAMENTARY ELECTION LAW.

A RIGHT THAT A MAN HAS TO GIVE HIS VOTE AT THE ELECTION OF A PERSON TO REPRESENT HIM IN PARLIAMENT, THERE TO CONCUR IN THE MAKING OF LAWS WHICH ARE TO BIND HIS LIBERTY AND PROPERTY, IS A MOST TRANSCENDANT THING, AND OF A HIGH NATURE.—*Lord Chief Justice Holt.*

By SAMUEL WARREN, Esq., F.R.S.,
OF THE INNER TEMPLE,
ONE OF HER MAJESTY'S COUNSEL, AND
RECORDER OF HULL.



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P R E F A C E

TO

THE SECOND PART OF

THE

MANUAL OF PARLIAMENTARY ELECTION LAW.

DISAPPOINTMENT having been expressed on account of the delay which has occurred in the appearance of this portion of the work, explanation and apology are deemed necessary, and are now respectfully offered, by the Author, to those who purchased the former portion of the work in July last.

It was solely on account of the pressure existing on the eve of the general election, that the Author, as he stated in the preface, was prevailed upon to allow the work then to appear, though completed no further than to the stage of the election: reserving the remainder for publication “within a few *weeks*.” He fully expected to have been able to redeem his promise by the middle of October; and is alone responsible for not having done so till now.

He begs, however, to remark, that the entire work is based upon a complete and comprehensive plan, to which, from the first, he has been resolved to adhere; but when he sat down to consider, with adequate care and deliberation, the existing state of the administration of Election Committee law, he found that the remainder of his undertaking would require such an amount of labour and thought, as he had never contemplated.

Having digested the bulky mass of the Printed Minutes, recording the proceedings of upwards of thirty Election Committees, from 1848 to 1852, and also the Reports preceding them, as far back as the terse and masterly notes of Glanville, in 1623, he became aware that he must either abandon his task altogether; perform it perfunctorily; or use the greatest exertion of which he was capable, to complete his labours patiently and thoroughly. He chose the last; and has, consequently, had to go through severe labour, and make serious sacrifices; cheered, however, by a sense of the favour with which the first part of the work had been received by the profession, and the public.

He was informed some months ago, by eminent members of the House of Commons, that he would be rendering an acceptable service to those serving on Election Committees, by exhibiting a systematic view of existing Election Committee law, and, as far as practicable, in a popular style; referring in every instance to *principle*, and stating, in particular, as clearly as might be, the leading doctrines of AGENCY, and especially of EVIDENCE, in its recently remodelled state. This is what he has endeavoured to effect, with a sincere desire of affording some assistance to gentlemen discharging duties of transcendent public importance, as well as suddenly augmented delicacy and difficulty. With what success his efforts have been attended, must be left to those entitled to decide.

It is surprising how many decisions of committees, based on a former state of the law, and to be found in even some recent text books, are not only become utterly useless, but calculated, if urged upon committees, seriously to mislead. Perhaps a third of the author's labours can be taken no account of by his reader, since it has been consumed in examining cases which, for this reason, he was

compelled to discard. The extensive changes, in short, effected by the Election Petitions Act 1848; the statutes relating to Bribery, Treating, Agency, and above all, Evidence; and by that of the 6 Vict. c. 18, strictly limiting and defining the jurisdiction of the Select Committee,—have rendered some such work as the present almost indispensable, even provided it were only tolerably executed.

The Select Committee for the trial of an Election Petition, is as completely a judicial tribunal, and, in the exercise of its jurisdiction, as independent of the House of Commons, as any of the courts of law and equity; and there is a growing disposition among the members constituting this distinguished and responsible tribunal, to adhere, as closely as possible, in the administration of justice, to legal rules and principles. The consequences of occasionally failing to do so, may be seen signally illustrated by a case cited towards the close of this work.*

On a recent occasion [A. D. 1851], the able and experienced chairman of the *Aylesbury* Committee† authoritatively intimated to counsel, at the outset of the case, as the desire of the committee, that “counsel would confine themselves, with reference to points, as far as possible, to the quotation of *legal, and not parliamentary, decisions* ;” while in the year 1843, Chief Justice Tindal,‡ in the first exercise of the jurisdiction entrusted to the Court of Common Pleas by stat. 6 Vict. c. 18, prohibited the citation of “decision of Committees of the House of Commons, *as authorities*.” The law relating to the parliamentary, is now nearly as well settled as that of the municipal, franchise; because both are determined by courts of law, on fixed and uniform principles: nor need we despair of seeing decisions of Select Committees, on the great and varied subjects submitted for their judi-

* Chap. xxv., p. 626.

† Pages 567, 568.

‡ Post, 363, A.

cial consideration, acquire, ere long, more than a semblance of system.

The Author begs to offer a short account of what may be found in the ensuing portion of his labours.—It contains fourteen Chapters. The first (the Fourteenth) gives a connected account of the formation and functions of the **SELECT COMMITTEE**. The second explains the preliminary **SECURITY FOR COSTS AND EXPENSES**, required by the House, containing an authentic account of all the decisions, of any importance, pronounced by the Examiner of Recognizances, in the Session of 1852. The third discusses the **PETITION**,—its structure and incidents; and the fourth, the **LIST OF OBJECTIONS** to Voters, on a Scrutiny. All these Chapters are based upon a careful Examination of the Elections Petitions' Act, 1848, and such well-considered, and reported decisions of Election Committees, as have been pronounced upon the construction of it.

The ensuing six Chapters (from the **XVIIIth** to the **XXIIIrd**, both inclusive) are devoted to the **JURISDICTION**, both appellate and original, of the Select Committee; and it is this portion of his labours which has occasioned the author the greatest effort. With all the Petitions of the Sessions 1848 and 1852 lying before him, and which he has carefully analyzed, he has seen almost every objection which can be made the subject of an Election Petition, by way of scrutiny, or as avoiding an election on general grounds of objection to its validity. Here are discussed, at length, and in the order of time, the sufficiency of the Petition, in point of form and substance; the title of the petition, as disclosed in it; the extent to which, and the manner and time in which, all such objections are to be taken advantage of. Then the **APPELLATE** jurisdiction, in reviewing the express decisions of the revising barristers. The **ORIGINAL** jurisdic-

tion is resumed, by considering those objections to the right of voting, which may arise between the completion of the Register, and the time of voting; as well as the cases of electors erroneously excluded from the lists submitted to the revising barrister, and consequently not brought to his notice. Next are examined the various **IRREGULARITIES** and **INFORMALITIES** which may arise in the conduct of the election; which rendered it necessary to follow every step of the process, even from the issuing of the writ, to its return. Here are discussed—the writ, whether valid or void, and the consequence of the latter; the returning officer; the directory, imperative, or prohibitory character of statutes, the provisions of which have not been complied with, and the practical consequences: as affecting the notice of election; the times of opening and closing polls, and the consequence of unduly abridging, or extending, the period of polling; the proposal of candidates, whether it must be by electors, or may be also by strangers—and whether it may be done after the nomination, and during the polling;—the show of hands, and demand of a poll (and here are discussed several recent and valuable decisions on these subjects by the Court of Queen's Bench); an interruption of the poll by rioting,—and an election rendered nugatory, by an organized system of intimidation.

The twenty-first Chapter (pp. 420—498), the most extensive in the work, is devoted to **BRIBERY**. Here are explained the principles on which a bribed vote is declared, by the common law of parliament, to be void; and the common and statute law of bribery, carefully traced from the time of Whitelocke (A.D. 1646*) to the passing of the Corrupt Practices Act, in 1852.—Whether

* It is needless to say that bribery is to be regarded as having been always an offence at common law. Post, 423, *et passim*.

the vote of the person *bribing*, is thereby avoided; the legal and parliamentary consequences of bribery, to the candidate, and the nature of the disabilities which it entails; bribery by himself, or by his agents, and with or without his knowledge; notice to electors of the disqualification of a candidate, through bribing at a previous election, with an examination of certain recent decisions of select committees; the operation of the law postponing proof of agency, till after proof of bribery; general bribery; and the compromise of petitions involving charges of bribery. The twenty-second Chapter (pp. 498—548) goes with similar minuteness into the law of **TREATING**; tracing the origin and growth of that law, and showing its exclusive statutory character; the combined operation of the two statutes of William III., and Victoria; the mode of bringing treating home to the candidate; and the nature of the disability entailed by treating at the election preceding that which is being held, where the unseated candidate stands again.

The twenty-third Chapter discusses the subject of the **PROPERTY QUALIFICATION** required of a candidate; the nature of it; the time and manner of demanding, and of declaring it, and taking advantage of defects existing in either respect; and the mode of effectively giving notice, at the election, of the disqualification of a candidate. The twenty-fourth Chapter is devoted to a full exposition of the legal doctrine of **AGENCY**, and its precise operation, in the Administration of Election Law. Into this Chapter it has been sought to condense the results of an examination of almost every leading and recognized parliamentary decision on the subject. The twenty-fifth Chapter deals in the same manner with **EVIDENCE**: explaining the successive legislative improvements in it during the last ten years, gradually

annihilating incompetency on the ground of **INTEREST**, till at length **PARTIES** themselves are admissible, and compellable to become, witnesses: these changes inducing a corresponding effect on documentary evidence. Then are explained the principles on which *declarations* are rendered admissible; and the nature of the right of witnesses to refuse answering questions tending to criminate them. The leading doctrines of evidence are exhibited with reference to—adducing the best evidence; the exclusion of hearsay; the *onus probandi*; admissions; presumptions of law, and fact; the mode of examining, cross-examining, and re-examining witnesses; the proof of official and public documents, as recently simplified and facilitated by statute; the Speaker's warrant for the production of documentary evidence, considered with reference to the new power of examining parties. The twenty-sixth Chapter relates to the **PRACTICAL PROCEDURE** before the Select Committee, from the moment of its assembling, to its declaring the final Resolutions:—including objections to the petition, or petitioners; the order of taking several petitions; the number of parties to be heard; adjournments; the opening of the case by counsel; separating the case, with or without the consent of parties; the proof of the poll; together with all the other incidents during the hearing. The twenty-seventh Chapter is devoted to costs; embracing the history of their allowance, by parliamentary common, and statute law; the various cases in which special, and general, costs are allowed or refused, and the principles on which Select Committees act;—together with the compendious and direct process provided by statute, for ascertaining the amount and enforcing the payment of costs.

In the Appendix will be found an extensive series of Forms and Precedents, including eight, of Petitions,

respectively from England, Scotland, and Ireland, embracing all the chief grounds of complaint before Election Committees, and selected with care, chiefly from the petitions of the present session. The decisions of the Court of Common Pleas on Registration Appeals, up to the close of Michaelmas Term, 1852, and pronounced since the appearance of the former part of this work, will also be found in the Appendix.

The Author, in submitting to the public the final result of his labours, ventures to offer two general observations.

It appears to him inconsistent alike with the interest and the dignity of Parliament, to tolerate longer the confused and perplexed state of that law which so intimately affects the very existence of the House of Commons. Few can better appreciate the extent of that confusion and perplexity, than those who have painfully attempted to reduce it into a semblance of order. When the great legislative changes in our representative system were effected in 1831, as detailed in the introductory chapter of this work, the Legislature thought proper to content itself with simply continuing in force "all laws, statutes, and usages" not "repealed" by the acts of that year, "inconsistent with their provisions." There appear to be consequently at least TWO HUNDRED AND FORTY-ONE* statutes at this moment in force, relating to the election, return, sitting, and voting, of members of the House of Commons! The Author cordially concurs with Mr. May, and all others who earnestly recommend a consolidation of the Election Laws, as a matter of high public concernment.

Finally. Notwithstanding this defective condition of our election laws, they possess, as recently remodelled, and

* See Mr. May's practically useful pamphlet on the Consolidation of the Election Laws, p. 4.

the administration of them aided by the statute rendering all parties to election proceedings admissible and compellable witnesses,—energies enabling them to cope with corruption, to an extent altogether unprecedented. The admirable amendment of that act, just proposed by its noble and learned author, Lord Brougham,—namely, by removing, under due restrictions, the existing obstacles to full disclosure, arising out of the right to refuse answering questions tending to criminate,—will complete the machinery for extracting truth. In cases of extensive and inveterate misdoings on the part of constituencies,—doings which, it is already fearfully found, can no longer be kept in darkness,—the Legislature may think proper to act sternly on the maxim,

IMMEDICABILE VULNUS

Ense recidendum, ne pars sincera trahatur.

It were unbecoming, however, the character of the British Legislature, to evince any tendency to heat or precipitation in encountering so grave an exigency, as that existing in the case of an extensively corrupt constituency. A sedate and dignified dealing, and in a sorrowful spirit, with that exigency, *to the extent required, and no further*, is expected by the nation. The amount of deep-seated corruption, daily developed by the judicial tribunals appointed to inquire into it, is affecting all men with profound concern. Party feeling perishes in the presence of so grievous a national misfortune and humiliation. Every honest member of the Legislature owns that a great effort must be made, guided by justice and discretion, as far as practicable to cure, and to prevent.

Where, alas, there is *a will* to corrupt, and be corrupted, however, there will also *be a way*. To extend the exercise of political power, and at the same time ef-

fectually guard its purity, is a great problem in legislation; the difficulty of solving which appears with most distinctness to those, whose lot it has been to examine the cases incidentally brought to light, before Select Committees of the House of Commons. The impression left on the mind is that of sorrow and mortification; forcing one to exclaim—how much corruption exists, which *no legislation* can prevent, detect, or punish!

INNER TEMPLE,
15th March, 1853.

TABLE OF CONTENTS.

CHAPTER XIV.

AN ELECTION PETITION—ITS CONSTITUTION AND FUNCTIONS.

Prolonged efforts of the legislature to secure the efficiency of a tribunal for the trial of controverted elections, 271 ; Mr. Grenville, and his Act, 272 ; Its main features, 273 ; Modification, *id.* ; Remodelling of the system in the year 1828..273, 274 ; Another remodelling in 1839, by stat. 2 & 3 Vict. c. 38, 275 ; Final remodelling in 1848, by stat. 11 & 12 Vict. c. 98, *id.* ; Expedients to secure a sense of personal responsibility in the members of the Select Committees, 276, 277 ; Process of the formation of it, 277 ; General committee of elections, 278 ; Its duties, 279 ; Admitted excuses from serving on Select Committees, 279, 280 ; The chairman's panel, 280, 281 ; Division of the whole House liable to serve into five panels, 287 ; Choice of the Select Committee, *id.*, 282 ; Their oath, 283 ; Their course of procedure, 284 ; Their powers, 285 ; not *functus officio* on making its report, 286 ; Responsibilities and difficulties, 287—289 pp. 271—289

CHAPTER XV.

SECURITY FOR COSTS AND EXPENSES.

One thousand pounds, 290 ; Two methods of providing the preliminary security—Recognizance, or paying into the Bank of England, 291 ; Recognizance a circuitous and troublesome method of providing the preliminary security, *id.*, 292 ; Petitioner no party to the recognizance, 292 ; Examiner of recognizances, his appointment, powers, and duties, 292, 293 ; Procedure on the recognizances, 293, 294 ; Mode of scrutinizing and objecting, *id.* ; Statutory enumeration of objections, 295 ; Decisions during the sessions 1852-3..296, 297 ; Prospective glimpse of costs, 298—300 pp. 290—300

CHAPTER XVI.

THE PETITION AND THE PETITIONERS.

Statutory definition of an election petition, 301, 302; Of petitioner, 302; Great importance of these definitions, *id.*; General summary of the grounds of an election petition, 302—304; Petitioners—those who voted, or had a right to vote, 304; Discussion as to voters *de jure* and *de facto*, 304—306; Claimants to have been elected or returned, and alleging themselves candidates, 306; Discussion as to, *id.*; Claimants *de facto* and *de jure*, 308; Death of sitting member after the petition, and before the appointment of the Select Committee, 308; Elevation to the peerage, *id.*; Seat declared vacant, *id.*; Sitting member declining to defend, *id.*; Procedure of Speaker and General Committee in such cases, *id.*; Voter admitted to defend with, or in the room of, the sitting member, 309; Death of sitting member during the sitting of Select Committee, unprovided for by the statute, *id.*; A late case, *id.* 310; Petitioner dying, *id.*; An old case, *id.*; Member unseated on merits of return alone, admitted on petition to try the merits of the election, *id.*; Four cases, 310, 311; Accession to the peerage of petitioner between the election and presentation of a petition, 311; A late case, *id.*; Practical cautions in selecting petitioners, 311—313; If one only act, of several competent, it would suffice, 313; Presentation of the petition, 314; Standing Orders' requisites of petitions, *id.*; Classification of election petitions by the House, 315; Periods within which election petitions must be presented, *id.*; Strictness of the House in this respect, 315, 316; Prorogation of parliament does not interfere with the adjudication in election petitions, 317; No longer necessary to renew them, 317, 318; How and when lawful to withdraw an election petition, 318; Form and substance of an election petition examinable by the Select Committee alone, 319; How it ought to be framed, 320, 321; Essence of the petition, a *complaint*, 321.

pp. 301—322



CHAPTER XVII.

LISTS OF OBJECTIONS TO VOTERS.

Statutory lists of objections to voters, requisite only in case of *scrutiny*, 323; Great importance of accuracy, *id.*; Decision as to insufficiency, final, 324; Practical illustration, 325; One case in which no list of objections is necessary, 326; No evidence admissible against any vote not included in the lists, 327 pp. 323—327

CHAPTER XVIII.

JURISDICTION OF THE SELECT COMMITTEE.

PART I.—SCRUTINY.

Jurisdiction, Original and Appellate.

The petition the first matter to be adjudicated upon by the Select Committee in the exercise of its *original* jurisdiction, 328; Effect of the House having ‘*received*’ a petition, 329; The *Derby* case, 1852, *id.*; Discussion of the procedure of the House on that occasion, 329—332; Select Committee’s inquiry into the sufficiency of the petition, 332, *et seq.*; Analysis of the petitions of 1848 and 1852, as to the statements in them of the title of the petitioners, 335—337; Improper subscriptions of petitions, 338, 339; When objections may be taken, 339, 340; *Appellate* jurisdiction. I. ENGLAND AND WALES, 340, 341; Restricted jurisdiction of the Select Committee, 341; Appeal from the express decision of the revising barrister, 341, 342; What evidence of proceedings at the registration, *id.*, 347; Revising barrister should attend the committee, 341, 342; Scruples of some revising barristers considered, 343—345; Power to inquire into the right to vote *generally*, 345; Evidence of the tender of a vote omitted or expunged by the revising barrister, 347; Select Committees now guided by the authoritative decisions of the Court of Common Pleas, 348, 349; *Case of the extra glut-tide waiter*, 349. II. IRELAND—jurisdiction of the Select Committee now the same as in English cases, 349. III. SCOTLAND—Difficulties experienced by committees as to opening the register, 350; Description of the process of Scotch registration, 350—353; The powers of Select Committees in no degree restrained in respect of decisions by the Sheriff’s Court of Appeal, 354; The Linlithgo case, 354, 355; *Invernesshire*, 355, 356; *Peebles*, 356; Unsatisfactory state of the law in Scottish cases, 356, 357.

pp. 328—357

CHAPTER XIX.

JURISDICTION OF THE SELECT COMMITTEE.

PART II.—ORIGINAL JURISDICTION—*resumed.**Scrutiny.*

The order of events in electoral proceedings pursued, 358; case of a voter’s name excluded from the lists through the unperceived accident, negligence, or fraud of overseers, 359; Original common-law autho-

CHAPTER XIX.—*continued.*

riety of the House of Commons, 359 ; Tender of the vote at the poll necessary, *id.*, 360 ; Register conclusive evidence of continuance of qualification, *id.* ; How far a distinction, in this respect, between counties and boroughs, *id.*, 361 ; Distinction between the conclusiveness of the register as to *continuing* qualifications between England and Ireland, 362 ; Residence continued to the time of voting in English boroughs, 363 ; Incapacity 'arising' subsequently to registration, *id.* ; The subject discussed as to England, Scotland, and Ireland, *id.*, 367 ; Personated votes, tendering, *id.* ; Voter prevented voting by violence or intimidation, 368—370 ; Voters employed at the election and paid, 370—374 ; Voter giving his vote under the influence of corruption, 374, 375 ; Treating an individual voter bribery, 376 ; The vote of one bribing a fellow voter not void, 376, 377 ; Errors made by the poll clerks in recording, or refusing to record, votes, 377 ; When he may, and when he may not, alter his entry, 378. pp. 358—378



CHAPTER XX.

JURISDICTION OF THE SELECT COMMITTEE.

PART III.—ORIGINAL JURISDICTION—*continued.**Informalities and Irregularities in the Practical Conduct of the Election.*

Determination of Select Committees to uphold elections conducted in *substantial* conformity with the law, 379 ; Has every elector had an *opportunity* of recording his vote ? *id.* ; General principle—Irregularities disregarded, if they have not affected the result of the election, 380 ; Departure from the prescribed course, exposes to censure and punishment though the election cannot be shown affected by it, *id.* ; Corrupt motives, *id.* ; DIRECTORY, IMPERATIVE, PROHIBITORY statutes—tests and distinctions, 381, 382 ; What *does* 'affect the result of an election,' not ascertainable till before a Select Committee, 383, 384 ; Consequences of an election under a void writ of summons, 384—386 ; Returning officer *de jure* and *de facto*—distinction very immaterial, 386, 387 ; The *Wakefield* Election (1842) discussed, 387, 388 ; His ineligibility to be elected for the place where he is 'returning officer,' *id.* ; Duty of the returning officer and all others to adhere as closely as possible to the directions of a statute, though merely such, 389 ; How a candidate is to be proposed, *id.* ; The show of hands, *id.*, 390 ; a non-electors cannot lawfully propose a candidate, *id.* ; Provision of the Scottish Reform Act, *id.* ; Poll demandable by electors

CHAPTER XX.—*continued.*

only, 391 ; Once demanded, must be granted, and cannot be waived by either the party demanding, or the candidate on whose behalf it was demanded, *id.* ; Refusal of a poll avoids an election, and exposes the returning officer to an indictment, *id.*, 392 ; Show of hands annihilated by the demand of a poll, 392, 393 ; Candidate proposed by a stranger may be elected, 393 ; Because adopted by the electors, *id.* ; At most, an irregularity waived by taking the poll, 394 ; A candidate may be proposed after the nomination, 394, 395 ; And at any time during the polling, 395, 396 ; The subject discussed, *id.*, 397, 398 ; A candidate may be proposed and elected in his absence, without his knowledge or consent, and against his will, 298, 399 ; Opening and closing polls, 399 ; Duty of returning officer to obey the statute as closely as possible, *id.* ; A single vote may affect the election, *id.*, 400 ; If the poll be kept open too long, votes then given void, *id.* ; So with votes where the poll is opened too soon, *id.* ; If the poll opened too late, election avoided, if result shown to be affected, *id.* ; Present powers of closing the poll earlier than the period limited by the statute, *id.*, 401 ; Polling hour in Scotland, *id.* ; In Ireland, 402 ; Riots no ground for finally closing, but only adjourning the poll, 403 ; *Cork, Coventry, Roxburg, and Second Harwich* cases, 404, 405 ; Examination of the last decision, 405—409 ; *Semble*—that the decision was erroneous, but the returning officer acted erroneously, *id.* ; Freedom of election, 409, 410 ; Organised system of intimidation, 411 ; Spiritual terrors, 411, 412 ; The *County of Dublin* case, 1827..413—417 ; Meaning of ‘*freely* and indifferently,’ 417 ; Powers of the House of Commons, 418, 419 ; Not necessary to connect the sitting members with organised system of intimidation or violence, in order to avoid an election, 419 (n.) pp. 379—419

 CHAPTER XXI.

JURISDICTION OF THE SELECT COMMITTEE.

PART IV.—ORIGINAL JURISDICTION—*continued.**Bribery.*

Administration of the Law of Bribery by Select Committees not hitherto uniform or convenient, 420 ; Difference between the judgments of a Select Committee and a court of law, 420—422 ; The latter bound to assign the reasons of their decisions, 422 ; One advantage of indefiniteness, 423 ; Bribery, and attempts to commit it, common law offences, *id.* ; The law to be rigidly adhered to, *id.* ; When once proved to exist, the legal consequences of bribery easily definable, 424 ; *Key*

CHAPTER XXI.—*continued.*

to the doctrine of bribery, *id.* ; The giving, or withholding a vote *under corrupt influence*, *id.* ; Briber's election void, and bribed vote void, *id.* ; Personal bribery — the *Evesham* case, 425 ; Arguments in that case by direction of Sir Robert Peel, *id.* ; On the Resolution of 1677 and the statute law, *id.* 426 ; Statute 7 Will. 3, c. 4, against Bribery as well as Treating, *id.* ; Partial abstract of it, *id.* 427 ; The act declaratory of the common law, *id.* ; statute 2 Geo. 2, c. 24, s. 7..428 ; Its provisions, *id.*, 429 ; statute 49 Geo. 3, c. 118, *id.* ; Its provisions, *id.*, 431 ; statute 5 & 6 Vict. c. 102, s. 20, *id.* ; Its provisions, *id.*, 432 ; The *Durham* case (head-money), 432 ; Definition of bribery, on the part of a voter, 433 ; merely *asking* for a bribe, bribery, *id.* ; *Aliter*, with a mere offer to bribe, *id.* ; Allegations of bribery on the part of a voter, on petition, and lists of objections, 434 ; Bribed vote extinguished by common law only, *id.* ; Not an act of *punishment*, 435 ; Bribed vote so extinguished only at the particular election, *id.* ; state of the voter's mind at the time of giving the vote, the criterion as to the existence of bribery, *id.* ; The case of *Baker v. Rusk*, *id.*, 436 ; How the state of the voter's mind is to be ascertained, *id.*, 437 ; Time, and form, of bribery now immaterial, *id.* ; Bribery of a voter by money, &c., given to his relatives and friends, 438 ; The question discussed, whether the vote of the briber himself is *ipso facto* avoided, *id.*, 442 ; Bribery by the candidate personally or by his agents, 443 ; Definition of bribery grounded on statutes 7 Will. 3, c. 4 ; stat. 2 Geo. 2, c. 24, s. 7 ; 49 Geo. 3, c. 118, ss. 1, 3 ; and 5 & 6 Vict. c. 102, s. 20..443, 444 ; General definition of bribery by a candidate, deducible from all the statutes, 444 ; Allegations of bribery in petitions under the foregoing statutes, 445, 446 ; The corrupting or procuring the giving or forbearing a vote, the offence, 446 ; Must be actual : a mere attempt or unaccepted offer, not sufficient, *id.* ; Bribery by a candidate, personally, 447 ; May be by his own hand, or by another's with his knowledge, or by his direction, *id.* ; Statute 4 & 5 Vict. c. 57, and its requirements of the Select Committee, to report whether bribery with knowledge or consent of sitting member or candidate, 447, 448 ; How they used to report, and how they now report, 448—450 ; The *Cambridge*, *Derby*, and *Newcastle-under-Lyme* cases, 448—450 ; Detailed account of the last, 450—454 ; A leading case, *id.* ; Bribery at common law, its disabling effect—evidence of Whitelocke, 454, 455 ; History of the enactment of stat. 7 Will. 3, c. 4 : "UPON SUCH ELECTION," discussion of the words, 456—459 ; Bribery by an agent, though without his principal's knowledge, avoids the election, *id.* ; Explanation of the principles of parliamentary liability attached to the principal in respect of the unknown acts of bribery by his agent, 459—463 ; *Offer*

CHAPTER XXI.—*continued.*

to bribe an offence under the Municipal Corporation Act, but not under stat. 2 Geo. 2, c. 24, s. 7..464; inconveniences of former committees not distinctly specifying the fact of bribery in their Resolutions, 465; Since stat. 4 & 5 Vict. c. 57, remedied, *id.*; Notice to electors of a candidate's disqualification through bribery at a former election, 466; *Second Newcastle-under-Lyme* and *Second Cheltenham* cases, 466, 467; Where no such resolution because no petition or claim of seat by a candidate, 468; *Second Horsham* case, *id.*, 469; True principle of the disqualification, *id.*; Votes for such a candidate thrown away, 470, 471; discussion of the principle, 471—473; Disability accrues *ipso facto*, *id.*; *Sententia declaratoria* in ecclesiastical cases, 474; Examination of the common law doctrine of throwing away votes—recent decisions of the Queen's Bench and Exchequer Chamber in *Gosling v. Veley*, 475, 477; Report required to the House by stat. 4 & 5 Vict. c. 57; As to the candidate's knowledge and consent in case of bribery, 477; Evidence of bribery before evidence of agency, 478; History and discussion of stat. 4 & 5 Vict. c. 57..478—480; Objects to be kept in view by the Select Committee under this act, 480; Illustration of the effect of proving bribery before agency, 481; Operation of the rule in recent cases, 482; *Sudbury*, *id.*; *Ipswich*, 483; *Southampton*, *id.*; *First Nottingham*, *id.*; *Second Nottingham*, 484; *First Cheltenham*, *id.*; *Bolton*, *id.*; Committee to suspend their judgment till evidence connect bribery with the sitting member, *id.*; Disabling consequences attach to one guilty of bribery, though he do not petition, 484; If the seat claimed by or for him, *id.*; No petition admissible against a petitioner, *id.*; *New Windsor* case, 486; *Southampton*, *id.*; Abandoning claim of seat, no protection against recrimination, *id.*; candidate not petitioning, nor any one for him, 487; Compromises, *id.*; Statute 5 & 6 Vict. c. 102, *id.* 488, 489; Explanation and history of its enactment, 490; The bribery compromises of 1841..490; The *Nottingham* case, 490—492; What impairs the efficiency of the act, 493; The Corrupt Practices Act of 1852..494, 495; General observations of the law of bribery, 495; parliamentary consequences, *id.*; The eight-fold consequences of a proved act of bribery, 496; Beneficial effects of a firm and vigilant administration of the existing law, *id.*; Two suggested amendments, 496, 497.....pp. 420—497



CHAPTER XXII.

JURISDICTION OF THE SELECT COMMITTEE.

PART V.—ORIGINAL JURISDICTION—*continued.**Treating.*

Bribery and treating conterminous subjects, 498 ; Legislative embarrassments as to the mode of dealing with treating, *id.* ; Opinions of the Earl of Derby, Lord St. Leonards, Lord Brougham, Earl Grey, and Lord John Russell in 1852..498—500 ; Real difficulties of the subject, 500, 501 ; Innocent acts if tolerated liable to systematic abuse, 501 ; True clue in case of treating, the effect produced, or calculated to be produced, on the minds of voters, *id.* ; Impairing a *free and indifferent* choice, *id.* ; The word ‘*treating*’ not found in Lord Coke, Whitelocke, Blackstone, 502 ; First used by the legislature in 1842 by stat. 5 & 6 Vict. c. 102, s. 22, *id.* ; Why excluded from the Corrupt Practices Act, 1852, *id.* ; ‘Treating’ defined, *id.* ; Consequences of treating to voter, constituencies, candidate, *id.*, 503 ; No pecuniary penalties annexed to treating, *id.* ; A strictly statutable offence, *id.* ; Never one at common law, as evidenced by Whitelocke, *id.* ; Efforts of the House of Commons by Resolution, *id.*, 504, 505 ; A remarkable resolution in 1681..505 ; Attempted legislative interferences, *id.*, 506 ; Passing of stat. 7 Will. 3, c. 4, *id.* ; Its first section *in extenso*, *id.* ; Neither ‘bribery’ nor ‘treating’ to be found in it, 507 ; How far treating are acts of common law bribery, *id.*, 508 ; *Aldborough* case, 508 ; The *Thetford* case, 508, 509 ; The *Second Norwich* case, examined in detail, 509—514 ; The *Second Southwark* case, examined in detail, 515—517 ; The *Herefordshire* case, examined in detail, 518—522 ; The *Middlesex* case, 522 ; Construction of the statute of William in these cases, *id.* ; Value of contemporaneous interpretation of statutes, 523 ; Provisions of the statute of William 3 as to treating, 524, 525 ; The essence of its enactments, 525, 526 ; Examination of its terms, 526 ; ‘*Any meat, drink, entertainment, or provision,*’ *id.* ; ‘*in order to be, or for being elected,*’ *id.* ; Statute enforces a rule of evidence, 527 ; The *facts* of treating, after the writ, *conclusive*, *id.* ; ‘*Or by any other ways or means, on his behalf, or at his charge,*’ 528 ; The case of *Hughes v. Marshall*, 528 ; Judgments of Lord Lyndhurst, Baron Bayley, and ruling of Mr. Justice Patteson, 528—531 ; This an authoritative judicial interpretation of the act, 531 ; Treating practically resolvable into questions of agency, and evidence, 532 ; ‘*Upon such election to serve in parliament,*’ *id.*, 533 ; Allegation in the petition, of treating under stat. 7 Will. 3, c. 4..533 ; Act extends to SCOTLAND, 533, 534 ; Substantially also to IRELAND, 534 ; Minor modification in the Irish acts, *id.* ; Treating

CHAPTER XXII.—*continued.*

under stat. 5 & 6 Vict. c. 102, s. 22..535; The section *in extenso*, *id.*; Allegations in the petition under that statute, 536; Scope of this comprehensive enactment, 536, 537; *Agency* an essential feature, 537; Statutes of William 3, and Victoria *in pari materiâ*, and to be construed alike, *id.*; The *Carlisle* case [1848] examined, 538—542; Difficulty of supporting its conclusions, *id.*, 543; Treating not within stat. 4 & 5 Vict. c. 57..543; *Cambridge* case, *id.*; Candidate not affected by acts of treating committed by others not connected with him as agents, 544; General observations on bribery and treating, 545, 546; Practical difficulties of dealing with treating again illustrated, 546, 547; The opinion of Lord Mansfield, 547, 548.....pp. 498—548

CHAPTER XXIII.

JURISDICTION OF THE SELECT COMMITTEE.

PART VI.—ORIGINAL JURISDICTION—*concluded.**Property Qualification of a Candidate.*

Alteration of the law in 1838..549; Property qualification not required in Scottish members, *id.*; Professed objects of the legislature in requiring it, *id.*; Blackstone's account of its real object, *id.*, 550; Mr. Hallam, 550; Proposed abolition of the law in 1852, *id.*; Arguments for and against, *id.*; Practical operation of the act as adjudicated upon by the Select Committee, 550, 551; Meaning of "*at the time of the election*," *id.*; Demand by electors or candidates of a declaration of qualification, *id.*; Consequences of a *wilful* neglect, *id.*; Statement delivered in to the House of Commons before sitting and voting, *id.*; Consequence of false statement, *id.*; *Intrinsic* sufficiency of the qualification, in what it consists, 552; Property must be situate within the United Kingdom, *id.*; First *Harwich* case, *id.*; Correct *specification* of the qualification, 552, 553; *Onus* of impeaching lies on petitioners, 553; Time within which a declaration, when demanded, must be made, *id.*; Not required from an absent candidate, 554; Sufficient if the qualification be possessed at the time of the poll closing, *id.*; *Bristol* case, *id.*, 555; Votes thrown away as disqualified candidate, *id.* 556; The *Tavistock* case [1853] discussed, 556—558; *Cork* county case, *id.*; *Belfast* case, 559 pp. 549—559

CHAPTER XXIV.

AGENCY.

Great importance of the topic in Election Law, 560; Principal multiplies himself by the number of his agents, *id.*; His responsibilities of their sayings and doings, *id.*; Liability for their authorized and unauthorized acts, *id.*, 561; Parliamentary principal and agent, liability different from that of any other, 561; The subject of agency compared with that of evidence, *id.*; Implied and express agency, *id.*; Relationship once established, the same consequences follow, 562; Definition of an *agent*, *id.*; Distinction between *general* and *particular*, *id.*; What is the essence of agency, *id.*; Four ways of establishing agency, 563; Acts and declarations of agent co-extensive with authority, *id.*; Immaterial whether agent's statements true or false, as far as regards his principal's responsibility, *id.*; *Declarations* of agent accompanying *acts*, bind the principal, *id.*; Are then original evidence, not hearsay, *id.*; Admission of an agent is in the nature of a verbal act, 564; Sir William Grant's judgment in *Fairlie v. Hastings*, *id.*; Agency not provable by mere *assertion* of the fact, by the alleged agent, *id.*, 565; It must be proved by acts done, or admission of principal, 565; Doctrine of agency based on three maxims, 565, 566; Additional maxim in election law—*respondeat superior*, 566; Supreme importance of observing the fixed principles of the law of agency, 567; Especially in election cases, *id.*; Three-fourths of them depend upon it, *id.*; Special nature of parliamentary agency, 568; Office of a representative in parliament one of *public trust*, *id.*; Statement of the respective position of electioneering principal and agent, *id.*; Extensive authority necessarily entrusted by the former to the latter, *id.*; The principal often kept in careful ignorance of intended illegality, *id.*; The Select Committee disregards ostensible terms of appointment, and looks to acts and circumstances, 569; But agency must *exist as a fact*, however evidenced, *id.*; Nature and extent of electioneering privity, *id.*; Principal, agent, remote sub-agent, *id.*; The case of *Felton v. Easthope*, commented upon, 569, 570; Report imputing inexact expressions to Lord Tenterden, *id.*; Principal not bound by act of a special agent evidently beyond his presumed authority, *id.*; Lord Kenyon's doctrine as to an election committee, not applicable to election law, *id.*; Its number not held to be necessarily the candidate's agents collectively, and individually, *id.*; Case of *Ridler v. Moore and Francis*, examined, 571, 572; Decision repudiated immediately afterwards by the *Cirencester* committee, *id.*; How election committees usually constituted, *id.*; Without knowledge or interference of candidates, *id.*; Its members not fairly to be treated

CHAPTER XXIV.—*continued.*

as his *ipso facto* agents, 572; But committees will closely scrutinize these acts, *id.*; Act of bribery often itself pregnant with proof of agency, *id.*; Agency of a committee a question of evidence depending on the circumstances of each case, 573; Classification of facts usually regarded by committees as affording evidence of agency, *id.*, 574; Knowledge, or means of knowledge, by candidates, *id.*; Wilful blindness, *id.*; Cases in A. D. 1848,—*Great Yarmouth* case, *id.*; *Second Horsham*, 575; *Bolton*, *id.*; *Sligo*, second, 576; *North Cheshire*, *id.*; *London* case, universally repudiated, *id.*; Observations on decisions of agency questions by committees, as reported, *id.*, 577; *Chester* case, *id.*; *Shaftesbury* case, *id.*; Strongest *prima facie* case of agency may be rebutted, *id.*; Committees look at all the facts of a case taken together, *id.*; Consider probabilities, *id.*; Recapitulated tests of agency, 578; Declarations of general and special agents, *id.*, 579; Principal may ratify unauthorized acts of remotest sub-agents, *id.*; Agency in bribery cases, *id.*; In treating, *id.*; Acts of treating and agency when inseparably intermingled, *id.*, 580; *Cambridge* case, *id.*; *Aylesbury*, *id.* pp. 560—580



CHAPTER XXV.

EVIDENCE.

Recent liberation of the law of evidence from the shackles of centuries, 581; Old rule of competency, *id.*; Exclusion of INTERESTED witnesses, 582; Timid efforts of the legislature in 1833, *id.*; Bolder effort in 1843..583; Further steps in 1845, *id.*; Facilitating proof of documents, *ib.*, 584; Grand advance in 1851 by admitting the PARTIES in civil cases by Lord Brougham's Act, 585; Adhesion of the judges to the beneficial policy of the act, *id.*; Its provisions, *id.*; The present exceptions, 586; Its useful facilities for documentary proof, *id.*; Almost universal admissibility of witnesses in civil cases, 587; Only one apparent exception in an election statute, *id.*; Through the oversight of the framer, *id.*; Stat. 7 & 8 Vict. c. 103, and the Election Petitions Act, 1848, *id.*; Examination of the process by which the error arose, 587—590; The difficulty at length disposed of by the act enabling parties to be examined, 590, 591; Limitation on the liability of parties to answer question, *id.*; Stats. 4 & 5 Vict. c. 57, 5 & 6 Vict. c. 102, 15 & 16 Vict. c. 57..592; Refusal to answer questions tending to criminate, 593, 594; Refusal to answer questions tending to degrade or disgrace, 595; Question may be put, and refusal to answer will have its weight with the committee, *id.*; Admissibility

CHAPTER XXV.—*continued.*

of voters, 595, 596 ; Leading rules of evidence, 596, 597 ; Distinction between Select Committees and a jury, 597 ; One gives a *judgment*, the other a *verdict* only, *id.* ; Probabilities, inference, presumption, significant absence of proof, *id.* ; Presumption as to the CONTINUANCE of a state of things once established, *id.* ; Rules of evidence the same in all courts, 598 ; Explanation of the rule requiring the BEST EVIDENCE to be produced, *id.* ; HEARSAY, what it is, and why excluded, 599 ; When admissible as identified with an act, 600 ; EXAMINATION OF WITNESSES, *id.* ; Examination IN CHIEF, *id.*, 601 ; What are LEADING QUESTIONS, and why prohibited, *id.* ; Nature and extent of the right of a witness to *refresh his memory* by documents, *id.*, 602 ; Right of opposite counsel to look at them, *id.* ; Witness giving evidence contrary to his own previous statements, *id.*, 603 ; Case of *Melhuish v. Collier*, *id.* ; Cross-Examination, *id.* ; None allowed of a witness merely producing documents, *id.* ; Though inadvertently sworn, *id.*, 604 ; Cross-examination may extend to the whole case on both sides, *id.* ; Remarks on the *Yarmouth* case, *id.* ; No cross-examination as to collateral facts for the mere purpose of contradiction, 605 ; How witnesses' credit impeached and sustained, *id.*, 606 ; Evidence of a single witness sufficient to establish a fact, *Lyme Regis* case, *id.* ; *Cheltenham* case, *id.* ; *Ponderantur, non numerantur, testes*, 607 ; Testimony consistent or conflicting with PROBABILITY, *id.* ; Five general rules of circumstantial evidence, *id.* ; What evidence amounts to proof, 608 ; And the attendance of witnesses secured, *id.* ; The Speaker's warrant, *id.* ; The Chairman's order or summons, 609 ; Member *requested* to attend, *id.* ; Consequence of his refusal, *id.* ; Witness in custody, Speaker's warrant requisite, *id.* ; The *Lichfield* case, *id.*, 610 ; Opinion of Sir Robert Peel on the construction of the statute, *id.* ; What expenses demandable by a witness before giving his evidence, *id.* ; Punishment of MISBEHAVING witness, *id.* ; The sessional order, 611 ; Bribing a witness to stay away, a breach of privilege, *id.* ; How the committee will proceed, *id.*(n.) ; Prevarication, hesitation, and false evidence, *id.* ; *St. Alban's* case, *id.* ; *Lancaster* (1st) case, *id.* ; *Southampton*, 612 ; Compelling a witness to answer though he claims his privilege, *id.*, 613 ; Reference to the House for its opinion, *id.* ; The case of *Fisher v. Ronalds* (A.D. 1852), *id.* ; Decisive judgment of Mr. Justice Maule, 614 ; The three WARRANTS of the Speaker, *id.* ; Analogy to *subpœna*, and *subpœna duces tecum*, *id.*, 615 ; Witness required to bring and *produce* documents if ordered, *id.* ; *Bewdley* case, *id.*, 616 ; A notice to *produce*, 616 ; Distinction between it and a *subpœna duces tecum*, 616, 617 ; Operation of the act enabling parties to be subpœnaed and to bring documents, *id.* ; Parties and strangers, *id.* ; If the party not served with a *subpœna duces tecum*,

CHAPTER XXV.—*continued.*

a notice to produce should be given, 618 ; House of Commons cannot examine a witness so that his evidence shall be available before a Select Committee, *id.* ; Case of Sir Thomas Cockrane, *id.*, 619 ; Witnesses ordered to withdraw from the committee room, 619 ; Whether a committee can refuse to receive the evidence of one who disobeys the order, 620 ; Case of *Cobbett v. Hudson* [A.D. 1852], *id.* ; Procedure of committees on such an occasion, *id.* ; Evidence limited to the case opened, *id.*, 621 ; On whom the *burthen of proof* lies, *id.* ; A vote is presumed to be valid, *id.* ; Proof of proceedings in the Registration Court, *id.* ; Order of proof in cases of agency, 622 ; A practical test, *id.* ; Proof of the fact of election, *id.* ; Proof of the poll books, *id.* ; What the writ and return prove, *id.* ; Custody of poll books, 623 ; Production of them, *prima facie* evidence of authenticity, *id.* ; Objection discouraged by committees, 624 ; Proof when poll books are lost or destroyed, *id.* ; Proof of public documents, *id.* ; Official registers, the principles on which they are received in evidence, *id.*, 625 ; Why their contents proveable by proper copies, *id.* ; Evidence of the identity of person mentioned in them, *id.* ; What is sufficient, *id.* ; Sometimes mere identity of name, *id.* ; The case of *Sayer v. Glossop*, 626 ; Necessity of committees observing the rules of evidence, 627 ; Exemplified by the *Launcester* (2nd) case, *id.* ; All proper evidence of a marriage rejected, *id.* ; Proof of IRISH polls, *id.* ; SCOTCH polls, *id.*, 628 ; Concluding remark on the extensive operation of the act admitting parties to give evidence, *id.*... pp. 581—628

 CHAPTER XXVI.

PRACTICE.

The Select Committee a court of law, with a fixed mode of practice, or procedure, 629 ; What is meant by the PRACTICE of a court, *id.* ; Evidenced by usage, *id.* ; Course of practice not to be lightly departed from, *id.* ; Fallacy of urging hardship, *id.* ; Many heads of practical procedure disposed of in previous chapters, 630 ; What is done on the first assembling of the committee, *id.*, 631 ; Their PRELIMINARY RESOLUTIONS, *id.* ; The main object of them, 632 ; Danger of confusion from the number and complexity of parties and grounds of petition, *id.* ; Those parts of a case taken first which may summarily decide the general fate of the case, *id.*, 633 ; The shorthand writer and his minutes, *id.* ; Evidence once recorded not to be lightly, if at all, altered or obliterated, *id.* ; Instances of questions and answers expunged, *id.*, 634 ; Analogy to minutes of proceedings of courts-martial, *id.* ; Names of

CHAPTER XXVI.—*continued.*

counsel and agents handed in, 634; Petitions read, and order of taking them determined, when more than one, *id.*; That to be taken first which appears first entered on the *Journals*, 635; *Secus*, as to the votes, *id.*; How the votes and the Journal made up, *id.* (n.); How many counsel to be heard, when various parties, *id.*; Cases identical or distinct, *id.*; In case of double return, 636; Objections to the petition, *id.*; First, those on extrinsic grounds, *id.*; Impeaching the petition for irregularity or fraud, *id.*; Second *Canterbury* case, *id.*; *Sligo* case, *id.*; *Lyme Regis*, 637; Intrinsic objections to a petition, *id.*; *Aylesbury* case, *id.* 638; Adjournment applied for, *id.*; Not lightly granted, *id.*; Counsel's opening of the case, *id.*; No evidence allowed of matters not embraced by it and specified in it, *id.*; Lists of names in bribery cases, *id.*, 639; Of times and places in treating cases, *id.*; The *Derby* case, *id.*; Committee of forty-two in alleged bribery, *id.*, 640; *Lincoln* case, *id.*; Second *Harwich* case, *id.*; *Carlisle* case, *id.*; *Aylesbury* case, 641; Putting in the poll-books, *id.*; Counsel generally allowed to conduct the case according to his own discretion, *id.*; But committees may prosecute a particular case against the consent of parties, *id.*; *Athlone* and *Totness* case, *id.*; *Coventry* case, *id.*; *Lincoln* case, *id.*, 642; *Lyme Regis*, 642; *Harwich* (1851), *id.*; *Dublin*, 643; *Leicester*, *id.*; *Bodmin*, *id.*; *Harwich* case (2nd), 1851, *id.*; Course of procedure on a SCRUTINY, *id.*; Each vote a separate cause, *id.*; To be in all respects separately commenced, continued, and concluded, *id.*; Counsel taken by surprise by a decision, when an adjournment may be allowed, 644; Objection on the ground of stamp—if persisted in, committee will adjourn to admit of a stamp being obtained, *id.*; One branch of a case to be completed before another entered on, *id.*; Course of procedure when several opponents of same petition, *id.*; Rule in the courts of law, *id.*; *Nicholson v. Brooke*, *id.*; *Bodmin* case, 645; Two opponents severing, committee will not decide till both cases closed, *id.*; Sitting member withdrawing, petitioner still to prove his majority, *id.*; Petitioner disqualified, may still continue the scrutiny, *id.*; Admission of facts by the parties will not dispense with proof of facts on which the committee is to report, *id.*; *Carlisle* case, *id.*; *Horsham*, *id.*; Petition against the election, or return, or both, 646; “*The election the foundation, and not the return*”—*dictum* of Lord Coke, *id.*; Statement of the principle, *id.*; Sitting member unseated on merit of return, allowed to petition against his successful opponent, *id.*; Issuing a commission to Ireland, *id.*; May be granted at any stage of the proceedings, *id.*; Now rarely necessary from rapid communication existing, *id.*.....629—646



CHAPTER XXVII.

COSTS.

Costs given by the House of Commons from early times, 647 ; Costs at law the creature of statute, *id.* ; In Parliament, case of *Gloucestershire* (1624), *id.* ; *Southwark* (1695), 648 ; “Vexatious, frivolous, groundless,” *id.* ; Resolution of the House in 1700, *id.* ; Silence of the Grenville Act in 1770 on the subject of costs, *id.* ; First interference of the Legislature in 1788, by stat. 28 Geo. 3, c. 52, *id.* ; The recognizance for 200*l.*, 649 ; Statute carried into effect rigorously, *id.* ; *Bodmin* (1792), *id.* ; *Sutherland*, *id.* ; Second interference of the Legislature in 1828, by stat. 9 Geo. 4, c. 22, *id.* ; Made *imperative* by these acts, for committees to report whether petition or opposition frivolous or vexatious, 650 ; Now no report necessary except when costs inflicted, under the Election Petitions Act 1848, *id.* ; In what terms committees report, *id.* ; The *Rye* case (1848), *id.* 651 ; Principle on which parliamentary costs are allowed, *id.* ; Principle on which costs given at law, *id.* ; None in abortive criminal proceedings, *id.* 652 ; Remedy for instituting them maliciously and without reasonable and probable cause, *id.* ; Soundness of the policy on which the law of parliamentary costs is based, *id.* ; The committee adjudge cases frivolous or vexatious according to the conduct and circumstances of each case and the parties, *id.*, 653 ; Specification of the seven cases in which costs may be awarded, *id.* ; How long parties may persevere without being subjected to costs, 654 ; *Cheltenham* case, *id.* ; Clear proof of knowledge of facts, *id.* ; What costs to be applied for immediately after the discussion of a particular case, 655 ; *Harwich* (1st), *id.* ; No costs to strangers where names are involved in the proceedings, *id.* ; *Lyme Regis*, *id.* ; Party jointly petitioned against, and only one successfully, the *quantum* of costs claimable, 656 ; Mode of ascertaining costs, *id.* ; Within what time to be applied for, *id.* ; Who taxes them, *id.* ; Report to the Speaker, *id.* ; His certificate, what it contains, and its efficacy, *id.*, 657 ; How payment of costs so evidenced, recoverable in a court of law, 657 ; Form of declaration under the Common Law Procedure Act, *id.* ; Validity of Speaker’s certificate wholly unimpeachable, *id.* ; Mode of putting in suit the recognizance, *id.* ; Costs in cases of general bribery, under stat. 5 & 6 Vict. c. 102, *id.* ; Costs and expenses of commissions under the Corrupt Practices Act (1852), 658.....647—658



FORMS AND PRECEDENTS.

	PAGE
1. Form of Recognizance under the " Election Petitions Act, 1848"	455, A.
2. Affidavit of Surety	456, A.
3. Notice to Speaker on the Withdrawal of Petition ..	456, A.
4. Sitting Member's Letter, declining to defend his Return ..	456, A.
5. Speaker's Warrant for the Attendance of Witnesses ..	456, A.
6. Speaker's Warrant when a Witness is to produce Papers, Books, or Records	457, A.
7. Speaker's Warrant for the Inspection and Production of Public Papers and Records	457, A.
8. Notice by the General Committee	458, A.
9. Agent's Notification to Witnesses for Attendance ..	458, A.
10. Summons by Chairman of Select Committee	459, A.
11. Allowance to Witnesses	459, A.
12. Standing Orders on Public Petitions at the commencement of the First Session of the Parliament of 1852 ..	460, A.
13. Classification and Order of Reading Election Petitions ..	460, A.
14. List of Objections on a Scrutiny	460, A.
15. PRECEDENTS OF PETITIONS.—General Commencements and Statements of the Petitioner's Right to petition ..	463, A.
16. Petition against Two Sitting Members on the Ground of Bribery and Treating	463, A.
17. Petition for a Scrutiny, on the ground of Illegal Voting, by reason of having been illegally inserted in or retained on the Register by the Revising Barrister, or Subsequent loss of Qualification, &c.; by Paid Employment at the Election; by having been corrupted, or corrupting others; by Bribery and Treating; Wagers; Intimidation; Procuration; tendered Votes improperly rejected	466, A.
18. Petition on the Ground of a Candidate's want of Qualification	468, A.
19. Petition from Scotland for a Scrutiny, alleging Votes improperly inserted, or retained in, or expunged from the Register by the Sheriff and the Appeal Court, deficient Qualification, &c., &c., and Votes after Loss of Qualification ..	471, A.
20. Petition from Ireland, setting forth an organized and premeditated System of Excitement, Menace, Violence, and Intimidation	474, A.

TABLE OF CONTENTS.

xxix

FORMS AND PRECEDENTS—*continued.*

PAGE

21. Petition from Ireland for a Scrutiny; unqualified Voters voting; Loss of Qualification after Registration; Incapacitated Persons; Voters prevented by Violence .. 476, A.
22. Petition setting forth the Want of Qualification of a Candidate, and Notice to the Electors under Special Circumstances 478, A.

Supplemental Digest of Decisions of the Court of Common Pleas at Westminster in Michaelmas Term, 1852, continued from the Chronological List of Decisions, at p. 366, A. 485, A.

INDEX OF CASES.

A	PAGE
ALBAN's, St., case (1848) ..	611
———— (1851) ..	322,
	332, 638
Alban v. Pyke.....	350
Aldborough case.....	508
Amey v. Long.....	616
Anthony v. Segar	392
Ashby v. White	359, 409
Athlone case (1842) ..	311, 319,
	334
———— (1843) ..	383, 421,
	641
Att.-Gen. v. Le Marchant ..	616
Aylesbury case (1804)	487
———— (1848) ..	526, 620
	624, 637, 641
———— (1851) ..	339, 348,
	531, 581, 632

B.	PAGE
Baker v. Rusk	435, 446
Barker v. Stead	420
Barron v. Buckmaster....	481, A.
Bath case (1833)	554
Bayntun v. Cattle	547
Bedford case (1728)	313
———— (1838)	364
———— (1833)	372
Beeson v. Burton.....	479, A.
Belfast case (1838)....	325, 559
———— (1842) ..	303, 311, 334
Bewdley case (1848).....	615
Bishop's case	359
Blackburn case (1848)	623
Bodmin case (1792)	649
———— (1848) ..	640, 643, 645
Bolton case.....	484, 575
Boston case (1803)	313
Bradshaw v. Murphy	594

	PAGE
Bridgewater case (1803) ..	438
Bristol case	395, 554
———— (1833)	419
Bruyeres v. Halcomb	657
Burton v. Brooks.....	482, A.
———— v. Blake..	482, A., 483, A.

C.

Caernarvon case (1833) ..	311, 315
———— (1841)....	293
Cambridge case (1840) ..	376, 448
———— (1843) ..	456, 478,
	532, 542, 543, 580
Camelford case	457
Campbell v. Maund ..	379, 392, 394
Canterbury, 2nd case (1797) ..	636
———— case (1835)	311
Cardigan case (1842).....	409
Carlisle case (1848) ..	538, 640, 645
Carlow case (1848)	645
Carpenters' Company v. Hay-	
ward	597
Chamberlain of London's case ..	379
Cheltenham case (1848) ..	382, 484
———— 2nd (1848) ..	467, 468,
	474, 606, 611, 631, 654
Cheshire, North, case (1848) ..	547, 576
Chester case (1819)	577
———— (1848)	337
Chippendale v. Mason	644
Chippenham case.....	412, 417
Cirencester case (1803) ..	571, 621
Clark v. Saffery	601
Coates v. Candy	385
Cobbett v. Hudson	620
Colchester case (1781)	554
Collins v. Thomas..	482, A.
Cork (County) case (1835) ..	558
———— case (1842)	404

	PAGE
Coventry case (1803).....	438
——— (1833) ..	405, 419, 641
Cricklade case (1803)	438
Cuming v. Toms	566

D.

Dartmouth case (1845)	623
Derby case (1848) ..	449, 639, 654
Devises case	395
Doe v. Deakin	598
—— d. Eatham v. Wright ..	600
—— v. Hawkins	564
—— v. Palmer	598
—— v. Wainwright	590
Dover case	642
Downton case	316
Droitwich case (1833)	360
Dublin (County) case (1827)	368, 412, 413
—— (City) case (1836) ..	309, 384, 437
—— case (1848)	643
Duchess of Kingston's case	601
Duncomb v. Daniel	343
Dunfermline case (1803) ..	369, 572
Dungarvon case (1834) ..	449, 457, 458, 465, 514, 535, 589
Durham case (1804) ..	316, 507
—— (1843) ..	432, 459
Dwyer v. Collins	616, 618

E.

Entick v. Carrington	616
Evesham case (1838) ..	370, 371, 425, 469, 504, 645

F.

Fairlie v. Hastings	564, 579
Feddon v. Sawyers	482, A.
Felton v. Easthope	460
Fenn v. Harrison	562
Fisher v. Ronalds	613
Fleckner v. United States Bank	566
Ford v. Smedley	484, A.
Forfar case (1830)	534

G.

	PAGE
Galway case (1833) ..	325, 486
Gloucester case	399, 647
Gloucestershire (West) case, (1848)	553, 621
Gordon, Lord George, case ..	565
—— v. Gurney	297
Gosling v. Veley	475
Great Marlow case (1842) ..	639
Grimsby case (1813)	313
Gwynne v. Burnell	382

H.

Haigh v. Belcher	605
Hamilton v. Bass	479, A.
Hamp v. Warren	386
Handley v. Ward	604
Hanson v. Shakleton	386
Harding v. Stokes	439, 464
Harwich case (1848) ..	338, 552, 639, 655
—— (1st, 1851) ..	342, 343, 344, 345, 349
Harwich (1st, 1851), (Chapman's case)	373, 645
Harwich case (2nd, 1851) ..	326, 332, 405, 609, 640, 642, 643
Hawkins v. Rex	475
Helleston case	316
Henslow v. Fawcett ..	439, 446
Herefordshire case (1803) ..	312, 518, 526
Hertford case (1628)	385
—— (1833) ..	569, 611
Hill v. Coombe	604
Hindon case (1777)	458
Honiton case (1782) ..	313, 649
Horsham, 1st case (1848) ..	493, 645
—— 2nd case (1848) ..	457, 468, 474, 575, 620, 624, 644, 646
Hughes v. Marshall ..	427, 507, 528, 531, 541, 547
Huntingtower (Lord) v. Gardiner	423, 435

I.

Ilchester case (1803) ..	419, 544
—— 2nd (1804) ..	435, 470

INDEX OF CASES.

xxxiii

	PAGE
Inverkeithing case	369
Inverness case (1835) ..	354, 355, 628
Ipswich case (1784)	422, 527
——— (1835) ..	439, 461, 574, 590, 623
——— 2nd (1842) ..	372, 448, 449
Ive's, Saint, case	423, 439

J.

Jarvis v. Peele	482, A., 483, A.
Jeffrey's case	379
Johnston v. Sutton	662
Jordaine v. Lashbrooke	681

K.

Kidderminster (1848) ..	620, 624, 634, 640
Kinsale (1848), Farley's case	375

L.

Lambert v. Overseers of New Sarum	483, A.
Lancaster case (1848)	421
——— Dodgson's case ..	611
——— Harrison's case ..	366
——— Preston's case ..	626
——— Whiteside's case ..	366
Leicester case (1848) ..	372, 620, 634, 643
Lewes case (1842)	478
Lichfield case (1842)	609
Limerick case (1833) ..	380, 383
Lincoln case (1833)	641
——— (1848) ..	542, 620, 640
Lindlithgow case (1839)	354
——— Kennie's case	355
——— Richie's case	354
——— Robb's case	354
——— Tele's case	355
Liskeard case 1804) ..	316
Liverpool case (1821)	419
London case (1838)	576
Longford case (1833)	645
——— (1838)	419
Lyde v. Barnard	523

	PAGE
Lyme Regis case (1842) ..	322, 326, 531, 543, 610
——— Seller's case ..	360
——— (1848) ..	437, 606, 631, 637, 642, 656

M.

Maidstone case (1838) ..	457, 469
——— 2nd (ib.)	466
Mallow case 1833)	645
Mastin v. Escott	474
Maugham v. Hubbard	602
Mazzetti v. Williams ..	444, 561
Melbourne, case of	598
Melhuish v. Collier	602
Middlesex case (1625)	418
——— (1804) ..	622, 678, 621
Midhurst case (1804)	580
Mitchell v. Jenkins	652
Monaghan case (1833)	646
Moonmouth case (1835, Hall's case)	364
Montgomery case (1833) ..	370, 380
Moore v. Overseers of Carisbrooke	483, A.
Morris v. Burdett	307
Mortimer v. M'Callons	626
Muntz v. Sturge	307, 398

N.

Newcastle case	316
Newcastle-under-Lyme, 1st case (1842) ..	450, 449
——— 2nd (1842) ..	422, 426, 448, 456, 457, 459, 466, 467, 472, 478, 531
Newton v. Chaplin	616, 617, 618
Nicholls v. Dowding	601
Nicholson v. Brooke	644
Norris v. Staps	379
Northampton case	316
North Cheshire (1848) ..	547, 576
Norwich case (1787)	510
——— 2nd (ib.) ..	452, 509, 513, 515
Nottingham case (1819) ..	339

	PAGE
Nottingham case (1803)	399, 419
—— 1st (1833)	440, 459, 460, 480, 483, 484, 492, 532, 569

O.

Oxford case (1853)	531, 534, 449
--------------------	------------------

P.

Panton v. Williams	652
Parkhurst v. Louton	594
Parkin v. Moon	601
Pearse v. Morrice	381, 382
Pebleshire case (1848)	354
—— Scott's case	356
Penryn case (1827)	313
Phipson v. Harnett	588
Porter v. Weston	652
Pouchers v. Norman	374
Pryce v. Belcher	127, 306

R.

Ranson v. Dundas	290
Rawson v. Haigh	565
Reading case (1830)	364, 622
Reg. v. Bliss	600
—— v. Gayard	595
—— v. Governors of Darlington School	442
—— v. Lambeth	384, 412
—— v. Sutton	379
Rex v. Almon	442
—— v. Bale	601
—— v. Brooke	604
—— v. Chapman	601
—— v. Cudlipp	312
—— v. Dixon	594
—— v. Duncombe	602
—— v. Garbett	593, 594, 614
—— v. Leicester, Justices of	382
—— v. Loxdale	382
—— v. Munday	476
—— v. Murphy	601
—— v. Norwich	382
—— v. Parry	314
—— v. Pitt	425, 426
—— v. Sparrow	381

	PAGE
Rex v. St. Martin's, Leicester	602
—— v. St. Pancras	392
—— v. Tanner	598
—— v. Trevenen	312
—— v. Vario	379
—— v. Watson	596
Ribbans v. Crickett	521
Richardson v. Chasen	318
Ridler v. Moore and Francis	570
Ridley v. Gyde	565
Rochester case (1835)	343, 621
Roden v. Ryde	625
Rogers v. Davenant	379
Rooke's case	442
Roxburgh case (1838)	405
Russell v. Rider	602
—— v. Smith	442, 625
Rutter v. Chapman	379
Rye case (1848)	421, 650

S.

St. Alban's case (1848)	611
—— (1851)	322, 332, 638
St. Ives' case	422, 439
Salford case (1838)	323
Sampson v. Yardley	599
Sandwich case (1808)	313
Sayers v. Glossop	625, 626
Seaford case	316
Shaftesbury case (1838)	577
Sheldon v. Butl.	483, A.
Sinclair v. Stevenson	602
Sligo case (1838)	636
—— (1848)	576
Smith v. Hendrew	625
Southampton case (1833)	360, 486, 621
—— (1842)	448, 483, 610, 612, 621, 638
Southwark case	390, 648
—— 1st (1796)	487, 515
—— 2nd (ib.)	504, 508, 513, 515, 517,
Stamford case (1677)	313
Stockbridge case (1689)	424
Sudbury case (1842)	482, 595, 639
Sussex Peerage case	523
Sutherland case	649

INDEX OF CASES.

XXXV

T.

	PAGE
Taunton (1838), London's case	367, 621
Tavistock case (1853)	556
Taylor v. Phillips	385
Tennant v. Hamilton	605
Thetford case 508, 509, 541, 569	
Thomas v. Edwards ..	530, 541
Thompson v. Pearce	371
Titchmarch v. Chapman ..	473
Totness case (1842)	641
Tralee case (1838).....	589

U.

Udall v. Walton.....	593
----------------------	-----

W.

Wagstaffe v. Sharpe	420
Wakefield case (1842)	391
Warwick case (1833) 313, 610, 635	

PAGE

Waterford case (1842)	311
Weobly's case.....	313
Westbury case	426
Weymouth case (1842) 325, 623	
Whithorn v. Thomas	348
Whittaker v. Izod	594
Wigan case (1842) ..	343, 376, 596
———— (1846)	532
Winch v. Winch.....	355
Windsor, New, case (1804) 486	
———— (1835) 347, 364, 372, 373	
————, George's case..	360
————, Long's case ..	374
Wood v. Machinson	604
Worcester case (1835)..	372, 377

Y.

Yarmouth case (1848) 574, 604	
Youghal case (1838).....	439
Young v. Timmins.....	422

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CHAPTER XIV.

AN ELECTION COMMITTEE—ITS CONSTITUTION AND FUNCTIONS.



WE have now explained the nature of the elective franchise, and the capacities and disqualifications of those by and in favour of whom it is exercised, together with the means provided by the law for ascertaining each of these several matters. We have also described the process by which the Commons of the Kingdom declare, by the exercise of the franchise, their will who shall be their representatives in the House of Commons; and also indicated divers disturbing forces, irregularities, and undue influences, whether by way of intimidation, violence, bribery, or treating, which may injuriously affect or altogether nullify the exercise of the franchise.

We have at length arrived at the final stage of our inquiries—the tribunal by whom must be examined, and if necessary rectified, any suggested miscarriage of the electoral process; with whom, as representing, and supported by, the power and authority of the whole House of Commons, it rests to determine at once and finally, who shall or shall not be permitted to take or retain his seat as a representative of the Commons of the Kingdom, and incidentally, who shall have incurred liability to condign punishment, for violations of this high department of the public laws.

The due constitution of this distinguished tribunal—a Committee of the House of Commons for the trial of a controverted election—has long exercised the anxieties, and taxed the ingenuity, of the most eminent statesmen and members of both Houses of Parliament, of every shade of political opinion. To secure it from the suspicion of undue influence or prepossession

of any kind, so as to entitle it thoroughly to the confidence of the country, recourse has been had, during a long series of years, to almost every imaginable device; but till lately with only a very moderate degree of success. To acquire a just idea of the space gone over in this department of constitutional legislation, the reader's eye should travel, though rapidly, over the interval between the years 1770 and 1848; noting that in the former year, controverted elections were undoubtedly and confessedly determined by the whole House of Commons, as mere party questions, calculated to test the strength of contending factions.* In the former year Mr. Grenville, by a noble effort, succeeded in carrying through the legislature an act which has ever since passed under his name, (the Grenville Act, stat. 10 Geo. 3, c. 16,) and secured some considerable approximation towards the formation of a court of justice for the trial of election petitions. In language indicative of his strong feelings, he declared his object to be to give some check "*to the abominable prostitution of the House of Commons in elections.*"† The Act recites that "the present mode of decision upon petitions complaining of undue elections or returns of members to serve in parliament, frequently obstructs public business, occasions much expense, trouble and delay to the parties, is defective for want of those sanctions and solemnities which are established by law in other trials, and is attended with many other inconveniences." The humiliating necessity for such a measure Mr. Grenville thus asserted in introducing his celebrated bill. "Instead of trusting to the merits of their respective causes, the principal dependance of both parties is their private interest among us; and it is scandalously notorious that we are as earnestly canvassed to attend in favour of the opposite sides, as if we were wholly self-elective, and not bound to act by the principles of justice, but by the discretionary impulse of our own inclinations. Nay, it is well known that in every contested election, many members of this House, who are ultimately to judge in a kind of judicial capa-

* Thus Sir Robert Walpole, after repeated attacks on his government, resigned at length, in 1741, in consequence of an adverse vote on the Chippenham Election Petition! See Mr. May's *Law and Practice of Parliament*, 437 (2nd ed.)

† Hansard's *Parliamentary History*, vol. xvi. p. 903 (n.), quoted in Mr. Pickering's *Controverted Election and Parliamentary Committees* (A. D. 1852), 2nd edit. pp. 125, 126.

city between the competitors, enlist themselves as parties in the contention, and take upon themselves the partial management of the very business upon which they should determine with the strictest impartiality !”

This act has been loudly lauded for the wisdom and utility of its provisions, as well it might be, when they were contrasted with the procedure which they were devised to supersede. Mr. Fox emphatically, and almost enthusiastically, declared that it formed “ a judicature as complete and ample, perhaps, as human skill could constitute !” * The present learned Mr. Justice Coleridge, in a note to his edition of Blackstone’s Commentaries, published in the year 1825, states,† that “ this statute is justly celebrated for the wisdom and utility of its provisions. Its principal objects are to secure a fair election of petition committees; to limit their number and ensure the constant attendance of the members; to impose upon their conduct the solemn sanction of an oath; and to invest them with proper powers for procuring the attendance, and taking the examination of witnesses. One observation,” continues the learned judge mildly, “ may be excused, on a seeming inconsistency in this statute, the permitting each party to nominate a member of the committee. The nominees indeed are *sworn*, with the rest of the committee; but it is scarcely possible to suppose that a person so chosen and delegated to watch over the interests of the party choosing him, can be a juror qualified to try the evidence without partiality.”

The main feature of the Grenville Act, which was repeatedly amended as experience developed its defects, was the selection of committees *by lot*, so as to preclude, as far as seemed practicable, the suspicion of partiality. The last of the acts based upon it,‡ and passed in the year 1828,—the year after the note of Mr. Justice Coleridge,—established the following system, which may be instructively compared with that which has superseded it. It will however be immediately observed, that the first stage of the procedure which took place in the House of Commons was liable to this objection,—that whichever party attended in the greatest force on the day appointed for

* Hansard, vol. xlix. (3rd Series), p. 917.

† 1 Blackst. Comm. 181, note (31).

‡ 9 Geo. 4, c. 22.

a ballot, was of course likely to have a preponderance in the committee; and the expedient of chance did not, under such circumstances, operate as a sufficient check to party spirit, in the appointment of election committees. Partiality and incompetence were indeed very generally complained of in the constitution of committees appointed in this manner.*—On the day appointed for taking into consideration an election petition, *one hundred* members being present,† the petitioners, their counsel or agents, and the counsel or agents of the sitting members, were ordered to attend at the bar of the House, the door of the House being thereupon locked, and no member suffered to enter or depart from the House until the parties should have been directed to withdraw. The order of the day having then been read, the names of all the members of the House, written or printed on distinct pieces of paper, of nearly the same size, and folded up in the same manner, were put into six glasses, placed on the table for that purpose, and the clerk or clerk-assistant publicly drew the papers, and delivered them to the Speaker to read to the House, which he continued to do till *thirty-three* names of members then present had been drawn. The parties then retired from the House,‡ together with the clerk appointed to attend the committee, and who presented a list of the thirty-three members to each of the parties, who thereupon withdrew to separate places, for a few minutes, to consider which should be the eleven names which it might be expedient to strike off. Having determined upon them, the two parties met in the presence of the committee-clerk, and commenced the process,—quaintly but significantly called *knocking out the brains* of the committee,§—of reducing the thirty-three to eleven names; the petitioner commencing, and then the sitting member, and so striking out the requisite number alternately. This was to be done within the space of half-an-hour after they had quitted the House; at the expiration of that period the clerk returning and delivering in the reduced list. The eleven so left were

* May, p. 438.

† Stat. 9 Geo. 4, c. 22, s. 18.

‡ S. 30.

§ *I. e.*, every one of eminence was of known politics, and consequently struck out by those opposed to him.

thereupon sworn as the committee.* The evils of this system were universally recognized and deplored; and in the year 1839 the late Sir Robert Peel brought in a bill establishing a new one† on different principles, having for its object to augment the responsibilities of individual members, and leave but little to the operation of chance. This act, however, two years afterwards (A.D. 1841), was pronounced by the legislature to have “been found defective,” and was repealed in the latter year by stat. 4 & 5 Vict. c. 58. This statute having been continued by intermediate acts till the year 1844, was in that year itself repealed by another elaborate act (stat. 7 & 8 Vict. c. 103). This again, having been explained, in the year 1848, by stat. 11 & 12 Vict. c. 18, was repealed at the close of the same session, by stat. 11 & 12 Vict. c. 98, which is the act now in force,‡ and passes under the statutory designation (s. 107) of “*The Election Petitions Act, 1848.*” Suffice it, for the present, to intimate that this last effort of the legislature appears to have been successful; and without echoing the sanguine eulogium of Mr. Fox on that of 1770, that the existing judicature is “as complete and ample, perhaps, as human skill can constitute,” it may be safely asserted that it is not easy to point out in what important particulars the constitution of an election committee of the present day can be improved.§ It is a tribunal consisting of but few members, invested with dignity, power, and responsibility. It has to deal with a matter of universal interest and concern to the empire, namely, whom that tribunal ought, in a disputed case, to pronounce entitled to a seat in the British legislature, possibly, too, for seven years; an erroneous decision giving effect to vile and iniquitous

* The author has several times been present on such occasions in the House, as counsel, and can testify to the vivid excitement prevailing throughout the process. As soon as the names of those out of whom the committee was to be chosen, had been ascertained, the manifest exultation or depression of the respective parties, pretty decisively indicated, that they considered the fate of the petition as already decided. To a rightly constituted mind, reflecting that all this was to be considered a preliminary sworn judicial transaction, the scene was shocking.

† Stat. 2 & 3 Vict. c. 38.

‡ See post, p. 266, A.; and the statute itself, in *extenso*, pp. 329, A., et seq.

§ It has indeed been several times proposed that the adjudication upon controverted elections should be vested in an independent tribunal; but the House of Commons is unlikely ever to part with so large an element of its rights and privileges.

practices, and fixing on a recalcitrant constituency an obscure and unworthy member, instead of the real object of its choice, a virtuous citizen, it may be, of transcendant qualifications for the public service.

Those concerned, doubtless, constantly bear in mind that an election committee, unlike all other committees of the House of Commons, is a court for administering justice under the sanction of an oath. Its members are sworn to try, and to give a true judgment, according to the sworn evidence,—its purity being guarded, as will by and by be seen, with extreme vigilance and jealousy. The proceedings of such a tribunal are expected to be conducted with calmness and dignity; nor should any attempt be made, or for an instant tolerated, to disfigure or degrade them by displays of levity or indecorum of any kind. Every such attempt should be treated as a high impertinence. The members, moreover, can never for a moment lose sight of the magnitude of the interests with which they are dealing, and will endeavour to maintain throughout a watchful judicial temper, addressing their attention carefully to every question which comes before them, so that they may do right in the case before them, and their decisions afterwards be referred to as affording a safe and creditable precedent for the guidance of other committees. It is expressly enacted, moreover, in order to charge every individual member with personal responsibility, that “no member of the committee shall be *allowed to refrain from voting* on any question on which the committee is divided:” and beyond this, the name of every member voting, and whether in the affirmative or negative, together with the question on which the decisions arose, is entered on the minutes, and reported to the House.* Thus the House, the press, and the country at large, including the watchful legal profession, have the means of seeing at a glance the state of facts and of law on which the vote was given, and judging as to the manner in which each member discharged his duty. It has been well remarked,† that, under the existing ‘Election Petitions Act,’ the House of Commons acts as a court administering the statute law. Little discretion is left to them beyond that of interpreting the act, and executing its provisions. Every enactment is positive and compulsory; the house, the commit-

* Sects. 80, 81, post, p. 346 A.

† May, 442.

tees, the speaker, the members, are all directed to execute particular parts of the act; and, in short, it is not possible to conceive a legislative body more strictly bound by a public law, over which it has no control, and in administering which it has so little discretion.* It is perhaps well that it is so, if only for the sake of satisfying the public that justice is administered according to fixed general rules, irrespectively of particular cases, thus avoiding alike all temptation and opportunities for going wrong. Before proceeding to explain the present method of appointing election committees, it may be well to call the attention of members entering parliament for the first time, to the practical necessity of acquainting themselves minutely with the practice of the House in appointing these committees, and with their own position and liabilities. The following observations of a gentleman of official experience in such matters are worthy of special notice: "If members neglect to attend at the proper time (as they too often do), they subject themselves to annoyance and expense, and may cause serious pecuniary damage to the parties. By a little attention to the course of proceedings, a member may always avoid being taken by surprise. He should first examine the panels, which are printed and distributed with the votes, and by observing the number of that in which his own name is inserted, he may judge how soon it is possible that he may be chosen. He must bear in mind that a new panel is in the order of service for every week in which election committees are appointed; and if his absence should be unavoidable during the week in which committees will be chosen from his panel, he should apply to the House for leave of absence. He is acquainted also every Saturday morning, by a conspicuous notice in the votes, what election committees will be chosen during the ensuing week, from what panel, and on what days; and if he be on that panel he should be in readiness, in case he should be appointed on any one of the committees, and receive notice to attend and be sworn."†

The first step towards the formation of an Election Committee is taken by the Speaker. In the first session of every Parlia-

* Its helplessness was remarkably illustrated in the cases of disputed election recognizances in the session of 1847-8, and which occasioned the passing of the temporary statute, 11 & 12 Vict. c. 18, after numerous discussions, and an inquiry by a committee. See now stat. 11 & 12 Vict. c. 98, s. 17; May, 446.

† May, 458, 459.

ment, on the day after the last allowed for receiving election petitions, and in every subsequent session as soon as is convenient after its commencement, he lays his warrant on the table of the House, publicly announcing the fact at the time, appointing **SIX MEMBERS** *willing* to serve, and against whose return no petition is depending, and none of whom is himself a petitioner—the propriety and urgent necessity of such a condition being obvious,—to form a committee, to be called ‘**THE GENERAL COMMITTEE OF ELECTIONS.**’ These gentlemen the Speaker selects with a scrupulous regard to political impartiality, and to their qualifications in respect of ability and parliamentary experience, usually including members from each of the three kingdoms, for counties, boroughs, and the universities.* The House, however, has three days for considering the appointments, all or any of which they may disapprove of; in which case a new warrant is made out by the Speaker. In the event, however, of the House being satisfied with the Speaker’s selection, his warrant operates as an appointment of such General Committee.† Vacancies in and reappointments of this select and important body of functionaries are made in the same manner as the original appointment; and every member so appointed continues to serve till the end of the session, or till he resigns or ceases to be a member of the House, or is disabled by illness, or the committee itself is dissolved by reason of the continued absence of more than two of its members (not fewer than four being a *quorum*), or their irreconcilable disagreement of opinion, or a resolution of the House dissolving the committee.‡ The Speaker appoints the time and place of the first meeting of the General Committee; and before any member of the committee is qualified to serve upon it, he must have been sworn at

* The following, for instance, was the Speaker’s warrant for appointing the General Committee of Elections at the opening of the first session of the present parliament, on Friday, the 26th November, 1852. It was read as follows—“Pursuant to the provisions of the Election Petitions Act, 1848, I do hereby appoint the Right. Hon. Matthew Talbot Baines (M. P. for Leeds), the Right Hon. Sir John Trollope (M. P. for Kesteven and Holland, Lincolnshire), John Evelyn Denison, Esq. (M. P. for Malton), Robert Palmer, Esq. (M. P. for Berks), Thomas Henry Sutton Sotheron, Esq. (M. P. for the Northern Division of Wiltshire), William Monsell, Esq. (M. P. for the county of Limerick), to be members of the General Committee of Elections for the present session. Given under my hand, this 26th day of November, 1852. Charles Shaw Lefevre, Speaker.”—Votes, No. 11.

the table of the House “truly and faithfully to perform the duties belonging to a member of the committee, to the best of his judgment and ability, without fear or favour.”* The General Committee regulate their own proceedings, but in conformity with the provisions of the Act, minutes of their proceedings are kept by their duly appointed clerk; and a copy of those minutes is from time to time laid before the House. No Select Committee can be appointed by the general one, unless at least four of its members concur.† To that committee all election petitions are referred, and the Speaker communicates to them from time to time all matters relating to members of the House, with reference to election petitions,—such as notice of vacancies, deaths, declarations of declining to defend their seats, and reports concerning petitioners’ recognizances.‡ Thus much for the appointment of the ‘GENERAL Committee of Elections.’ The next step of the process, before this General Committee can enter upon its duties, is to ascertain the materials with which it has to deal,—in other words, what members are liable to be called upon to serve on election committees. For this purpose the clerk of the House reads over to the House the names of all members who have duly claimed to be wholly excused on the ground of their being more than sixty years old;§ and then, or at any other time within the time prescribed by the House, any member may offer for the consideration of the House other claims for being temporarily excused, the grounds of it being entered in the Journals, and the opinion of the House taken as to the sufficiency of such excuse. Every member having leave of absence from the House, is excused from serving, during such leave.||

The following excuses have been allowed by the House:—

The having tendered a vote at the election;¶

Members employed in the public service, and stating on

* Sect. 30, post.

† Sects. 31—34, post.

‡ Sect. 46, post.

§ This ground of excuse will not avail, unless the claim in respect of it be made before the member is chosen to serve (sect. 35). Seventy-seven members were excused on this ground on the 26th November, 1852.

|| Sect. 37.

¶ Comm. Journ. 38, 645. Having actually voted, is now an express disqualification (sect. 56). These excuses are collected by Mr. Rogers, *Law and Practice of Election Committees*, 34, note (a).

oath that it would be injurious to the public if they were compelled to serve ;

Cabinet ministers ; the Attorney and Solicitor-General ; the Dean of the Arches ; the Master of the Rolls,—appear all to have been excused, of course on applications by them, verified by their oaths ;*

The being ordered on foreign service ;†

The serving on a grand jury ;‡

Being on the *rota* at the Old Bailey, as an alderman of the city of London ;§

Having been a candidate at the last election, and being informed that he is to be a witness. ||

Every member who has petitioned, or been petitioned against, is disqualified for serving till his own case shall have been disposed of. A list of the members thus claiming to be excused, and of those appearing disqualified, stating the causes and duration of such temporary excuse or disqualification, is printed and distributed with the votes ; and corrections may be made in it, by the Speaker's leave, during the ensuing three days.¶

The list of members liable to serve having been thus finally corrected, is referred to the General Committee, who immediately commence their operations by the formation out of that list of "THE CHAIRMEN'S PANEL."** They are, in the first instance, to select 'six, eight, ten, or twelve' members to con-

* The application of a master in Chancery was refused. Journ. 58, 244. This office was abolished by statute 15 & 16 Vict. c. 80, s. 1.

† Journ. 60, 67, 68, 297, 314.

‡ Journ. 58, 139.

§ Journ. 23, 955.

|| Journ. 68, 222.

¶ Sects. 35—40. As to the general nature of these excuses, the reader is referred to Mr. May's work, pp. 451, 452.

** The following is the Chairmen's Panel, twelve in number, nominated by the first General Committee, at the commencement of the first session of the parliament 1852.

The Honorable Edward Pleydell Bouverie.

Thomas William Bramston, Esq.

Honorable Francis Charteris.

William Deedes, Esq.

Edward Divett, Esq.

James Milnes Gaskell, Esq.

Lord Robert Grosvenor.

Henry Arthur Herbert, Esq.

Honorable Edwin Lascelles.

Sir William Molesworth.

Henry Ker Seymer, Esq.

Right Honorable Edward Strutt.—*Votes*, 3rd Dec. 1852.

stitute the Panel ; but, if necessary, they may add ‘two, four, or six’ more, provided the numbers do not exceed eighteen at one time : but the House can give leave to exceed even that number.* Having thus completed the Chairmen’s Panel, it is reported to the House. No one on this Panel can serve on an Election Committee except as Chairman ; and having once served as such, he may claim to be discharged and excused from serving again on an Election Committee, as chairman or otherwise, during the remainder of the session. The members of this Panel are bound to continue upon it till the end of the session, or till they cease to be members of the House, or are discharged by leave of the House.† It will be obvious that the choice of this class of functionaries ought to be guided by their presumed fitness, in respect of standing, parliamentary experience, and judicial ability and temper, to discharge the responsible duties of presiding over Election Committees. On the efficient discharge of the chairman’s duties essentially depends the successful administration of justice by the tribunal over which he presides.

The next step of the General Committee is to divide the members remaining on the list into FIVE Panels, as nearly as may be in equal numbers : reporting such division to the House. The clerk of the House then publicly decides, BY LOT, at the table, the order of the panels, distinguishing each by a number denoting the order in which it was drawn. The panels, thus publicly ear-marked, are then returned to the General Committee, and from these panels are chosen the private members of the Select Committees. These panels may be corrected from time to time by the General Committee, by striking out the names of members ceasing to be members of the House, or becoming entitled and claiming to be wholly excused, and inserting the names of new members, not entitled, and not having claimed to be wholly excused ;‡ and these panels are printed and circulated with the votes.§

The General Committee then chooses THE SELECT COMMITTEE to try the petitions standing in the list, in their due order ; determining how many shall be chosen in each week, and the days on which they will meet for choosing such committees—and they have power to change the day and hour which they

* Sects. 41, 45.

‡ Sect. 43.

† Id.

§ Sect. 43.

may have previously appointed.* Notice of the time and place for choosing the Select Committee is published with the votes fourteen days before that appointed for such choice : such notice directing all parties interested to attend at the appointed time and place ; and notice is also published, with the votes, of the petitions appointed for each week, and of the panel from which each Committee will be chosen. If the conduct of a returning officer be impeached, fourteen days notice is sent to him through the post.†

On the day and at the time appointed, the General Committee chooses from the Panel in service, **FOUR MEMBERS**, who are not excused or disqualified from any cause whatever, especially by reason of having voted at the particular election ; or being the person on whose behalf the seat is claimed ; ‘ or related to him, or to the sitting member, by kindred, or affinity, in the first or second degree, according to the canon law’—‡ that is to say, as relates to *kindred*,—father, grandfather, brother, son, or grandson, and as relates to *affinity*, the husbands of females in the same degree of relationship : so scrupulous is the law in excluding any faulty constituent from the Committee. The General Committee, however, may disagree as to the choice of the Select Committee to such a degree of hopelessness, that the disagreement is referred to the House ; and thereby the General Committee itself is dissolved.§ Upon the same day on which the General Committee are thus choosing the private members of the Select Committee, the Chairmen’s Panel meet, and select one of their number, who must not be disqualified from otherwise serving on the committee, to become Chairman of the Select Committee ; but they do not communicate his name to the General Committee, till informed by the latter of their choice of the four members. Up to this point, therefore, neither the Chairman nor the four private members have the least idea, as individuals, of the relations which have been established between them as constituents of the Select Committee. The parties are now called in before the General Committee to hear the names of the five members read over ; on which they are directed to withdraw for the purpose of considering whether there be any objection to any of the selected members : but that objection is expressly and

* Sects. 49, 53.

‡ Sect. 56.

† Sects. 51—54.

§ Sect. 28.

strictly limited to the excuses or disqualifications pointed out by the act, and already explained.* ‘ Within one half-hour at furthest from the time of withdrawing,’ the parties are recalled to state their objections, if any : and in the event of their satisfying the General Committee of the existence of any *such* objection, another Select Committee is chosen from the same panel, and may consist of all the members of the former Committee except him or those successfully objected to. As soon as the Select Committee has thus been duly formed, written notice is given by the clerk to each of the five members, and of the special grounds of disqualification or excuse which may be insisted upon by the members themselves ; in order that on the following day they may have the opportunity of satisfying at least four members of the General Committee that ‘ there are circumstances in a particular member’s case relating not to his own convenience, but solely to the impartial character of the tribunal,’ which render him ineligible to serve.† If, for instance, he find that he has personally borne part in the conduct of the election questioned, by advising, or subscribing funds, or otherwise identifying himself with the parties to the investigation,—such circumstances may be unknown to the agents of those parties, or they may not choose to call attention to them : but the member himself, as an honourable and conscientious man, about to become a sworn judge in the case, would be bound to disclose the existence of any such fact. If, however, within the space of one quarter of an hour after the time mentioned in the notice for that purpose, no member appear, or appearing, fails to prove his disqualification or excuse, the Select Committee is taken to be appointed ; at or before four o’clock, or within one hour after, on the next day, they attend in their places in the House, under pain of being ordered into custody of the serjeant-at-arms, and otherwise punished or censured by the House, unless alleging, on oath, having been prevented by sudden accident or necessity ;‡ and before quitting it, they are sworn at the table by the clerk “ *well and truly to try the matter of the petitions referred to them, and a true judgment to give according to the evidence.*”§ They are thereupon taken to be a Select Committee legally appointed to try and determine the merits of the return or election so referred to them ; and the legality of such appoint-

* Sect. 62. “

‡ Sect. 69.

† Sect. 66.

§ Sect. 68.

ment cannot thenceforth be called in question on any ground whatever.* To this Special Committee the House refers the petitions and lists of voters which relate to the election which is to be tried, and orders them to meet at a time fixed by the House, which must be within twenty-four hours of their being sworn. At that time the Committee meet, and must continue sitting till the close of their labours, without adjourning for more than twenty-four hours, without first having obtained leave from the House, on motion, and special cause shown for a longer adjournment. No member of the Committee can absent himself without the leave of the House, or an excuse for the cause of sickness, verified on oath by the medical attendant, or other sworn sufficient cause. If such excuse be allowed, the member ceases to attend or act on the Committee. The Committee must never proceed to business till all its members are assembled: and if they fail to do so within an hour of the time appointed for the first meeting, or of the time to which it was adjourned, a further adjournment is made, and reported, together with the cause of it, to the House.† The absentee is then ordered to attend the House at its next sitting, when he will be ordered into the custody of the serjeant-at-arms, and punished or censured by the House, unless, as has been seen, he can satisfy it, upon oath, that he had been prevented from attending by sudden accident or necessity.‡ The Committee is not dissolved by the death or necessary absence of only *one*, or *two* members; and in the case of the Chairman being so absent or dead, the remaining members elect one of themselves in his place. If the Committee be reduced to fewer than three members for the space of three sitting days, another Committee must be appointed, *unless all parties consent* to two members, or even a sole remaining member, continuing to act and constituting the Committee.§ They deliberate on any question arising, after hearing evidence and counsel, if they think proper, with closed doors; a majority deciding, and in case of equality of voices, the chairman having a second or casting vote; and no member shall abstain from voting on any question on which there is a division.|| They are attended by a short-hand writer, appointed by the clerk of the House, and sworn by the Chairman ‘faithfully and

* Sect. 68.

‡ Sect. 76.

† Sects. 72—75.

§ Sects. 77, 78.

|| Sect. 80.

truly to take down the evidence, and from day to day to write or cause it to be written in words at length for the use of the Committee.' They have power to 'send for persons, papers, and records'—that is, to enforce the production of all necessary witnesses and documentary evidence, and may examine any person who has subscribed the petition which is being tried, 'unless it otherwise appear to such Committee that such person is an interested witness.' On this last provision of the statute, however, observations will be found in the chapter on Evidence,* tending to show that, notwithstanding the inadvertent language of the act, there does not at present exist any such limitation on the liability of parties to the petition to be examined as witnesses.

The oath to the witnesses is administered by the clerk of the Select Committee; and it is armed with great powers for dealing with disobedient, refractory, prevaricating, or false witnesses. The Chairman may, by direction of the Select Committee, report the misconduct of such persons to the House, for the interposition of its authority or censure; and by a warrant under his hand commit the offender to the custody of the serjeant-at-arms for twenty-four hours, if the House be sitting, and if not, for any time not exceeding twenty-four hours after the hour at which the House stands adjourned.† A witness is thus secured upon the spot, and prevented from escaping from the consequences of his misconduct. In addition to this, wilful false evidence given by any person, either orally or by affidavit, under the provisions of the act, is declared to be wilful and corrupt perjury.‡

Invested with these ample powers and authorities, the Select Committee proceeds to try the merits of the return or election complained of in the petition before them; determining 'by a majority of voices, if for the time being consisting of more than one§ member,' whether the sitting members, or either of them, or any and what other person, were duly returned or elected; or whether the election be void, or whether a new writ ought to issue, their determination being 'final between the parties to all intents and purposes,'|| and carried into execution by the

* Post.

† Sect. 83.

‡ Sect. 85.

§ But what if there be only *two* members, and they cannot agree?

|| "This clause in the act," says Mr. Rogers, "gets rid of the power to appeal against a determination upon the right of election, or the right

House, who enter the report upon their Journals. If, however, the committee come to a resolution other than any of those above mentioned, they may report it to the House for its opinion, the House then dealing with the matter as it pleases.* If the Select Committee should think proper, in order to avoid the inconvenience and expense arising from witnesses being brought from Ireland to be formally examined, they may make an order for the nomination and appointment of *commissioners*, at any period during the course of their proceedings, to take the requisite evidence in Ireland. On their reporting the result of their inquiries, the Select Committee is re-assembled, to proceed with the trial of the petition. The whole course of procedure in such case is prescribed by statute 42 Geo. 3, c. 106 (A.D. 1802), and will be hereafter considered separately. If a prorogation should occur before the committee has concluded its labours, and reported the result of them, the committee is not dissolved by such prorogation, but adjourned over till twelve o'clock of the day immediately following that on which parliament meets again. †

The wholesome checks and restraints devised by the legislature to guard, by inflicting heavy costs, against improvidently or wantonly challenging the validity of elections or returns, or resisting the rectification of miscarriage or misconduct, will form the subject of detailed consideration hereafter.

We have seen that an election committee‡ is not to consider itself entirely *functus officio* as soon as it has made its report to the House; for in consequence of what may have passed before them, and also of their own opinion and recommendation on the subject of bribery expressed to the House, they may be ordered to re-assemble within fourteen days, armed with all their former powers, attended by an agent appointed by the Speaker to prosecute that investigation which the parties had endeavoured to stifle by a compromise. These matters also, however, are reserved for special consideration in their appropriate place; as well as the JURISDICTION of the

to appoint returning officers, and all the provisions incident to the formation of committees of appeal, as originally provided by the statute 28 Geo. 3, c. 52, s. 25, and continued by stat. 9 Geo. 4, c. 22."—Law and Practice of Election Committees, p. 46.

* Sects. 86, 87.

† Sect. 88.

‡ Ante, p. 251; post, p. 268, A.

Select Committee with reference to the right to have been placed upon the register, and to vote at the election, and the entire conduct of that election, as well as of all parties concerned in it, all of which comes within the scope of the members' oath, which binds them 'to try **THE MATTER OF THE PETITIONS** referred to them.' This jurisdiction now depends upon two or three very important and recent statutes, as well as the common law of parliament.

Such is an outline of the existing system for inquiring into and adjudicating upon a disputed parliamentary election; and unless hereafter the House of Commons should consent to part with this right, which may be called the very flower of their prerogative, and to vest it in an independent judicial tribunal, in order to extinguish every spark of presumed political bias disturbing the exercise of judicial functions, it is not at present easy to suggest how that system can be materially improved. It is undoubtedly possible that some one, or perhaps more, of the five members constituting the tribunal may be youthful laymen, and unversed in the conduct of judicial investigations, and therefore likely to miscarry in the exercise of such important functions; but it is not very likely that they will be persons destitute of good education, of at least average ability and knowledge of the world, and above all conscientiously anxious to discharge, to the best of their ability, a solemnly sworn duty. In addition to this, the chairman is almost certain to be a gentleman of superior ability and long experience, qualifications which may also be largely shared by other members of the committee; and their number is so small as to impress each with a strong sense of individual responsibility, and inspire a laudable anxiety to discharge effectively a duty which is immediately subjected to such searching scrutiny by parliament and the public. It cannot however be disguised, that this high tribunal labours under serious disadvantages. Its five members are called upon to decide, on the spur of the moment, questions of law which would challenge the best energies of profound lawyers who have devoted their whole lives to such subjects; the reception and rejection of evidence—and the weight due to that evidence—matters argued before them often by astute counsel, and presupposing in the tribunal commensurate capabilities for judicial discrimination and decision. One of the most zealous asserters of the privileges of the House

of Commons, Lord John Russell, lately (A. D. 1848) expressed himself thus upon this all-important subject: "Former committees of this House, whether composed of eleven or thirteen gentlemen, have fallen into error, not from any wish or determination to act with partiality or injustice, but because, from being unable to discriminate as to the character of the evidence or the arguments of the lawyers who speak so ably and eloquently before them, being consequently in doubt, and unable to form a decided judgment on the question, they give their votes according to their political sentiments.* This arises, not from any determination to do wrong, but from the natural consequences of having the tribunal composed of unfit judges."† A committee, not one of whom may be a lawyer, or have received a lawyer's education, is called upon to decide questions of a very subtle and intricate character, such for instance as arise in discussions on freehold interests in county votes, involving the recondite doctrine of uses and trusts, simple, special, executory, resulting, implied, or constructive.‡ And this too as a court of appeal from the deliberate decision of a professional lawyer, the revising barrister.§ It certainly seems difficult to prove the propriety or advantage of this state of things. The mere recital, however, suffices to show the absolute necessity of members of Election Committees devoting their utmost energies to the discharge of such arduous duties. By becoming candidates indeed for seats in the legislature, they have impliedly pledged themselves to the public that they were qualified for the discharge of such high duties, and would exert themselves to the utmost in that behalf; and their plain duty to the House of Commons is to demean themselves so as to conciliate towards it the respect and affection, rather than provoke the anger or derision, of the public.

This chapter is diffidently designed for the use chiefly of

* In the year 1844, the late Mr. Gisborne stated in his place in Parliament that "he had that morning examined the Journals of the House, to see how far the decisions of the committees, since the passing of the act then in force for the trial of controverted elections, would bear a party aspect; and excluding five committee cases ending in compromises, he found that TWENTY-FIVE committees had decided in conformity with the politics of the majority of the members who formed those committees, and eight had decided the other way!"—Hansard, vol. lxxiii. p. 1534.

† Hansard, vol. 68, p. 162.

‡ Ante, p. 71.

§ Ante, pp. 71 et seq.

new and young members of the House of Commons, who are requested at the same time to bear in mind that the foregoing pages profess to present *only an outline* of the elaborate provisions of the 'Election Petitions Act, 1848,' designed by no means to supersede a careful study of that act, but only to exhibit a general view of its scope and policy. Greater detail would have involved only a re-arrangement, and at the risk of error, of its carefully disposed, minute and lucid details, with every item of which it is alike the interest and the bounden duty of members to make themselves thoroughly familiar. And it should be added, that Parliamentary Election Committees have been recently armed with far greater powers, and invested with commensurately greater responsibilities, than were ever possessed by or imposed upon their predecessors, as will abundantly appear when stating the existing laws relating to bribery and treating, and considering the operation of the recent statute, which it is conceived enables, and compels, all parties to election inquiries to come forward and give evidence. Each member of the committee will bear in mind every moment while sitting upon it, that, as has been already intimated, a prejudiced or inconsiderate vote of his, upon any question, and especially upon the main and final one, may inflict upon a brother member, as scrupulously honourable as ever sat in the House of Commons, foul and irreparable injustice; or foist upon that House one of an exactly opposite character. And finally, the slightest inclination to political bias or prejudice will doubtless be checked by the reflection, that, as the political and party sentiments and connexions of every one of the five members are almost invariably well known, their acts are watched with sleepless jealousy, as those of five gentlemen sworn "WELL AND TRULY to try the matter of the petition referred to them, and a TRUE JUDGMENT TO GIVE—ACCORDING TO THE EVIDENCE."

CHAPTER XV.

SECURITY FOR COSTS AND EXPENSES.



PRACTICALLY the first step taken towards impeaching an election return, is to provide the security required by the Election Petitions Act, 1848,* for the payment of such costs and expenses as may ultimately “become payable:” and till that security shall have been duly perfected, and the fact certified by the Examiner of Recognizances, the House will not “*receive*” an election petition.

The sum which has been fixed upon by the legislature as sufficient, in the first instance, against these contingent liabilities, is ONE THOUSAND POUNDS:† a reasonable provision, designed fairly to test the *bona fides* of persons impugning the return of a member of the House of Commons, to quicken their diligence in ascertaining the probability of success, and to protect all parties concerned, against inconsiderate, malicious, and harassing applications to parliament. Possibly the aforesaid sum of a thousand pounds may have to be returned,—if paid, as it may be, in advance,—or some of those who have become sureties for it, by the recognizance to be presently mentioned, or for any portion of it, may be called upon to discharge their liabilities. On the other hand, such may have been deemed the fault or misconduct of the parties, that a thousand pounds may form but a small portion of the pecuniary liabilities incurred.‡ We have to deal at present, however, with only the preliminary security for a thousand pounds. The parties to whom it may ‘become payable,’ in respect of all their ‘costs and expenses,’ are, as stated in the condition of the recognizance, any witness summoned on

* Stat. 11 & 12 Vict. c. 98, s. 7.

† Sect. 3.

‡ See s. 100. In *Ranson v. Dundas*, 3 Bing. New Cas. 123, the taxed costs for which the Speaker’s certificate was given, amounted to 4694*l.* 15*s.* 7*d.*, an amount which it is not difficult to imagine doubled or trebled.

behalf of the person or persons subscribing the petition; the sitting member, or other party complained of in the petition; or any party who may be admitted to defend the petition.* There are two modes of providing this security—one direct and easy, the other exceedingly circuitous and troublesome. The former consists of the payment of the whole sum of a thousand pounds, by the person or persons signing the petition, into the Bank of England, to the *account* of the Speaker and the Examiner of Recognizances—a functionary to be presently described—as *trustees*, for the purpose for which the security is taken: and on payment being duly made into the Bank of England, a bank receipt or certificate is given, which must be delivered to the Examiner of Recognizances. This course appears to be warranted by a proper construction of the language of the 6th section of the Election Petitions Act; though it seems not express on the point, and the matter was some time ago submitted to the consideration of the Speaker and of the late Mr. Wynne, both of whom were of opinion that the language of the section warranted the course of procedure in question. The practice has been in accordance with this view in at least three cases, in the year 1848, possibly also in others. The section in question enacts that any person or persons by whom an election petition is signed may, instead of procuring a recognizance for the *full* amount of 1000*l.*, pay into the Bank of England “*any amount* of money which he or they may think fit, not being less than 250*l.* :” and in such case the person or persons by whom the petition is signed must find sureties for so much only of the 1000*l.* as the sum paid into the bank falls short of that sum. It follows from this, that if any sum, but not less than 250*l.*, remain uncovered by the sum paid into the bank, a recognizance must be duly entered into, in conformity with the act, conditioned for the payment of such fractional sum. If, then, the parties promoting a petition are able to pay the sum of 1000*l.* into the bank, the Examiner of Recognizances will indorse on the petition a certificate of his receipt of the bank receipt or certificate:† and the petition is then delivered to a member of the House, who affixes his name to it, and presents it to the House.

It may be, however, that the promoters of a petition find it

* Sect. 3.

† Sect. 7.

inconvenient thus to pay in the whole sum of 1000*l.*, but are able to pay in a portion: in which event, a recognizance must be taken for the balance, or if none be paid in, for the whole sum of 1000*l.*, in the mode now to be pointed out. Every single step in the process is prescribed by the act, and must be followed with rigorous exactitude. It would be well for the parties to imagine themselves watched every moment by a lynx-eyed and experienced opponent, anxious to catch them tripping. Their object should be, to adhere as closely as possible to the very letter of the act, being particularly careful in filling up any form, whether printed or written.

It is to be observed, that the Recognizance now to be explained is not joined in by the petitioner, as was required in 1844 by statute 7 & 8 Vict. c. 103, s. 3; but is confined to the surety or sureties, by the following enactment of the Elections Petitions Act, 1848: ‘a recognizance shall be entered into by *one, two, three, or four* persons, as SURETIES for the person or persons subscribing such petition, for the sum of 1000*l.* in one sum, or in several sums of not less than 250*l.* each.’* The words of the act, it will be observed, are ‘A recognizance;’ and however many may be the sureties, if there be only one petition, they must all join in one recognizance. This is the true construction, and that acted upon in practice, in conformity with the opinion of the late, and the decision of the present, ‘EXAMINER OF RECOGNIZANCES.’ This officer is appointed by the Speaker, holds office during his pleasure, and executes the duties of his office conformably to the directions which he may from time to time receive from the Speaker;† and he has an office, in which he transacts all business relating to the recognizances. That instrument *may* be ‘in the form, or to the effect,’ set forth in the schedule to the act;‡ it being of course desirable to adhere as closely as possible to the form so given. It must also be entered into before the Examiner of Recognizances, or a justice of the peace; and the Examiner, and also every justice of the peace, is empowered to take it. The name and usual place of residence or business of the sureties, must be mentioned in the recognizances,—with ‘such other description of them as may be sufficient to identify them *easily*.’§ Every surety, also, at the same time, and before the same person who takes the

* Sect. 3.

† Post, p. 353, 254, A.

‡ Sects 9, 10.

§ Sect. 5.

recognizance, must make affidavit 'that he is seised or possessed of real or personal estate, or both, above what will satisfy his debts, of the clear* value of the sum for which he is bound by his said recognizance,' such affidavit being annexed to the recognizance. If the recognizance and affidavit *bear the same date*, it affords no ground of objection that it does not *expressly* appear that they were entered into at the same time. Both the recognizance and affidavit, if taken before a justice, must be duly certified under the hand of such justice, who,† it is to be observed, must be a justice of the peace acting in and for the place or district where the recognizance and affidavit are entered into and made,‡ which are expressly exempted from stamp duty.§ Thus entered into, duly completed, and certified, the two instruments are delivered to the Examiner. If any portion of the 1000*l.* has been paid into the Bank of England, the corresponding bank receipt or certificate must be delivered to the Examiner, at the same time as the recognizance and affidavits.

On or before the day when the petition is presented, and which must be within the time specified in the statute, as will be presently explained, the names and description of the sureties, 'when there are sureties,'|| *as set forth* in the recognizance, are entered in a book kept by the Examiner in his office: and, as well this book, as the recognizance, affidavit, and bank receipt, if any, are open to the inspection of all parties concerned.¶ It is not difficult to imagine the keen scrutiny which these instruments are doomed thenceforth to undergo, by those deeply interested in impugning their validity.

* Sect. 4, post, p. 330, A., note. By an unfortunate misprint (since corrected) in the earlier copies of this work, the word "*yearly*" is there interpolated between the words "*clear value*."

† Sect. 11.

‡ *Caernarvon* [1841], Barr. & Aus. 552. In this case the recognizance was taken in *Westminster*, before a justice of the peace for *Cardiganshire*. The objection was taken that the recognizance ought to have been entered into before a justice of the peace having jurisdiction in *Westminster*; and the Examiner affirmed the objection—reporting to the Speaker that the surety of the petitioner was objectionable "on the ground that a person named in the recognizance had not acknowledged the same."—[Votes, 22 Sept. 1841.] The petitioner, Lord George Paget, endeavoured but, of course, ineffectually to obtain leave from the House to present another petition. The House had no power to entertain the application.

§ Sect. 106.

|| Sect. 12. These words seem superfluous. There ~~must~~ be sureties, unless there be no recognizance.

¶ Sect. 12.

It would at first sight seem not difficult to comply with such explicit statutory requisitions; yet the instances are numerous in which the parties have failed to do so. A flaw has been suddenly discovered by an acute opponent, and the petition was at an end, with all the expense, exertion, and anxiety which had been bestowed upon it, as well as the hopes and fears which it had called forth: to the unspeakable mortification of some parties, and the relief and exultation of others. In the year 1847, in no fewer than eight cases of election petitions, there were so many serious defects in the recognizances and affidavits, which the parties concerned had no opportunity of discovering or objecting to, that the cases were referred to a Select Committee, early in 1848. The sitting members insisted that they had a right to take advantage of these errors, even though merely formal, because they perilled the remedy which the statute then in force (7 & 8 Vict. c. 103) had provided for the recovery of their costs: but that act afforded *no means of discovering any invalidity in the recognizances, or affidavits*. The Committee recommended a temporary act to be passed (stat. 11 & 12 Vict. c. 18) to meet those particular cases, and also that for the future the parties should have the same facilities for objecting to the validity of the recognizance and affidavit, which they already had for objecting to the sufficiency of the sureties. This, said the Committee, would enable the sitting member to see whether the security which guaranteed him his costs, were valid or not; it would give the petitioner an opportunity of correcting a clerical error, or an inadvertent mistake; and withdraw from *the House* the discussion of nice and intricate questions in matters of law, which can hardly be determined before such a tribunal, with justice to the parties, or with satisfaction to the public.* These recommendations were attended to by the Legislature. The Election Petitions Act of the same year enabled any sitting member petitioned against, or any *electors* petitioning and admitted parties to defend the election or return, to insist upon all or any of the following grounds of objection,—to the *recognizance* only,—‘*but not on any other ground.*’†

First. That the recognizance is *invalid*.

* Report of the Select Committee on the *Cheltenham* Election Petition, to whom were referred seven other petitions similarly situated, p. vi. (22 February, 1848.)

† Sects. 13, 15.

Secondly. That it was not duly *entered into* or *received* by the Examiner, with the affidavit thereunto annexed.

Thirdly. That the sureties, or any of them, are or is, *insufficient*.

Fourthly. That a surety is *dead*.*

Fifthly. That a surety *cannot be found, or ascertained*, from the want of a sufficient description in the recognizance—and that description the act requires to be such as will be sufficient to identify them *easily*,† and an objection that a surety's name, residence, or description is misdescribed, must be taken in *the terms of this clause of the statute*.

Sixthly. That a person named in the recognizance [i. e. the surety] has not *duly acknowledged* the same.

Some one or more of the foregoing grounds of objection must be stated in writing, under the hand of the objecting party or his agent, *in the notice of objection*; and it will suffice to adopt the words of the clause on which they are founded, without further specification, and delivered to the Examiner within the following periods:—*ten* days, or not later than twelve o'clock at noon of the *eleventh* day of the presentation of the petition, if the surety objected to reside in England; or if the surety reside in Scotland or Ireland *fourteen* days, or not later than twelve o'clock at noon of the *fifteenth* day after the presentation of the petition: but if the eleventh or fifteenth day should happen to be a Sunday, Good Friday, or Christmas Day, the notice must be delivered not later than twelve o'clock at noon of the next following day.‡

The Examiner forthwith puts up in a conspicuous part of his office an acknowledgment of the receipt of the objection—the petitioner and his agent being allowed to examine and take copies of every such objection; and the Examiner fixes a day for hearing the objections not less than *three* nor more than *five* days from that on which he received the statement of them: and should the fifth day happen to be a Sunday, the hearing may be on the *sixth* day. On the appointed day he inquires into the aforesaid objections, and into those only, examining upon oath, or by affidavit, all necessary witnesses: he may adjourn, from time to time, till he makes his decision: may award costs to be paid by either party to the other—a very salutary check on cap-

* This case is specially provided for by s. 16, and will be seen immediately.

† Sect. 5.

‡ Sect. 15.

tious objectors: and his decision is 'final and conclusive against all parties:' so that the House can no longer be harassed by such discussions.* In the event of any surety dying, and his death being stated in due time as an objection, the petitioner may pay into the bank the amount for which the deceased surety was bound—and on the delivery of a bank receipt for the same to the Examiner, within three days after that on which the statement of the objection was delivered to him, the recognizance shall be deemed so far unobjectionable.† The Examiner *forthwith* reports to the Speaker, if the recognizances are objectionable—and his decision being final and conclusive the petition is at an end; but if he decide that they are unobjectionable, or if he have received no statement of objection, he then reports, within the proper time,—that is to say, as soon as the time for stating the objection has elapsed, or as soon as he has decided on the statement of objection—that the recognizances are unobjectionable, his report being as before 'final and conclusive to all intents and purposes.' He also makes out a list of all the election petitions in which the recognizances are unobjectionable, arranged in the order in which they were reported, and keeps in his office a copy of the list, which is open to the inspection of all parties concerned.‡ If more than one petition relating to the same election or return are referred to the General Committee, the Examiner must report on each of such petitions or such as have not been withdrawn:§ and on the receipt of the last of such reports, the petitions are bracketed together, placed at the bottom of the then list, and subsequently dealt with as one petition.

The following will be found an accurate statement of the *points decided* by the Examiner of Recognizances, *on the Election Petitions Act*, 1848, generally after elaborate arguments by counsel, in the first session of the new Parliament, in the year 1852. Several of them have been incorporated into the text of the present chapter; but it is thought expedient, for practical purposes, to bring them under the reader's eye together.

I. GROUNDS OF OBJECTION.

1. That some one or more of the grounds specified in the 13th section must be stated in the notice of objections.

* Sect. 14, 15.

‡ Sect. 17.

† Sect. 16.

§ Sect. 48.

2. That it is sufficient if one or more of the grounds specified are stated in the words of the section, without further specification.

3. That, when in the computation of time for fixing the hearing of objections under sect. 14, the fifth day happens to be a Sunday, the hearing may be on the sixth day.

4. That the words at the foot of a recognizance, "taken and acknowledged before — on the — day of —, at —, &c." signed by a justice of the peace, are a sufficient *certificate* of the recognizance within the 11th section.

5. That no objection can be taken to the validity of the affidavit, or the jurat, or caption thereof, under the 13th section, but only to the recognizance.

6. The word "person named in the recognizance," means the surety.

II. FORM OF THE RECOGNIZANCE.

7. A recognizance which follows the form in the schedule to the act, using the terms "sitting member," although there may be two or more sitting members petitioned against, is *good*.

8. That a recognizance which *departs* from the form, using the words "sitting members," not adding "and each," or, "or either of them," is *bad*.

9. That one using the words "sitting members or either of them," is good.

10. That a misdescription in the recognizance, of the surety's name, residence, or description, can be objected to only on the ground given in the 13th section, "that the surety cannot be *found or ascertained* from the want of a sufficient description."

11. That it is not necessary, and is no ground of objection that it does not expressly appear, that the recognizance and affidavit were entered into before a justice at the same time—the two bearing the same date.

12. That a recognizance following the form, conditioned to pay the costs "payable by the *petitioners*,"* without adding "or either of them," is *good*.

* The *dicta* imputed to Lord Lyndhurst, C. B., and Bailey, B., in the report of *Gordon v. Gurney*, 2 Tyrw. Ex. 616, cited by Mr. Rogers in his *Law of Election Committees*, page 247, are *incorrect*, and do not appear in the contemporaneous report of that case in 2 Crompton & Jervis, 614. The liability of petitioners to costs under a joint petition is a joint liability, and cannot be severed. The *decision*, however, in

13. That the interpretation clause, sect. 108, applies to the form in the schedule.

14. That a recognizance which misdescribes the place to which the petition relates, if it follows the description in the petition itself, is good.

15. That there must be one, and cannot be more than one, recognizance in respect of each petition.

Though somewhat out of the direct order of procedure, yet with the view that intending petitioners may be induced to consider in the first instance the nature and extent of those pecuniary liabilities which they are about to incur, it is proposed to state the cases in which costs become payable.

It is possible, as already intimated, that none at all may become payable: that is, none may have been incurred by any one intended to have been assailed. If, however, this be otherwise, it may be in one of the following seven cases:—

First. At any time after presenting the petition, it may be withdrawn, by notice under the hand of the petitioner or his agent, to the Speaker, to the sitting member or his agent, and also to any one who may have been admitted to oppose the petition: either or both the latter two parties becoming then entitled to such costs as they may have already incurred,* and which will probably be trifling.

Secondly. If the Examiner think fit to award costs to either party, in respect of either making or resisting objections to the recognizances, they may be recovered as in the other cases of costs.

Thirdly. If the Select Committee report a petition “FRIVOLOUS OR VEXATIOUS” those opposing it before the Committee are thereupon entitled to recover from the persons, or any of them, who signed the petition, “the FULL COSTS AND EXPENSES incurred in opposing the same.”†

Fourthly. If the Select Committee report the OPPOSITION to the petition to have been “FRIVOLOUS OR VEXATIOUS” those who signed it are thereupon entitled to recover the FULL COSTS

that case, that one of them may be sued for the joint costs, is manifestly correct, inasmuch as it simply proceeds on the plain imperative words of the act then in force (9 Geo. 4, c. 22, ss. 57, 63), which are the same, as far as relates to this point, as those of the Election Petitions Act, 1848, ss. 89, 96; post, pp. 348, 350, A.

* Sect. 8.

† Sect. 89.

AND EXPENSES incurred by the petitioners, from “the party or parties with respect to whom such report is made.”*

Fifthly. Though no party appear to oppose the petition, if the Committee report the Election, or Return, or the *omission* or *insufficiency* of a return, “VEXATIOUS OR CORRUPT,” those who had signed the petition are thereupon entitled to recover the FULL COSTS AND EXPENSES incurred by them, from the sitting member, if any,—unless they have given due notice of their intention not to defend the election or return,—or from those admitted to oppose it.†

Sixthly. If the Select Committee be of opinion that any ground of objection to a voter, stated in the list of those intended to be objected to, was “FRIVOLOUS OR VEXATIOUS,” they are to report it to the House, together with their opinion on the other matters relating to the petition; and the opposite party shall thereupon become entitled to recover from any party *on whose behalf* any such objection was made, the full costs and expenses incurred by reason of such frivolous or vexatious objection.

Seventhly. If either party make any *specific allegation*, with regard to the conduct of the other party, or his agents, bringing in support of it either no evidence, or such that the Committee is of opinion that the allegation was made without any “REASONABLE OR PROBABLE ground,” the Committee may make such ORDERS as they think fit for the payment to the other party, by those making such unfounded allegation, of ALL COSTS AND EXPENSES incurred by reason of it.‡

It will thus be seen, that a distinct and special report of a Select Committee to the House is necessary, in those cases only where they intend to subject parties to costs, for frivolous or vexatious petitions; oppositions; objections to voters; vexation or corruption in respect of the election or return, or omission or insufficiency of it; or for making unfounded allegations against the conduct of opponents. If the Committee do not intend to inflict costs, their report is simply silent upon the subject. The matter thus rests entirely in the discretion of the Committee, with reference to the view which they may take of the conduct of all parties concerned, in every stage of the case. What they may hold to be frivolous and vexatious conduct, is a question dependent upon the circumstances of each case, and the position

* Sect. 90.

† Sect. 91.

‡ Sect. 93.

of the parties at the time when the respective steps were taken: and this being so, the caution and circumspection requisite in commencing or proceeding with the case, become obvious.

Analogous provisions respecting costs are contained in statute 5 & 6 Vict. c. 102, for discovering and preventing bribery and treating.* If the Committee shall report that there was reasonable and probable ground for the allegation of a petition presented under that act, they have power to order the costs of the petitioners to be borne as in the case of a Committee on any public matter ordered by the House of Commons.† A recognizance or recognizances, however, must be entered into before three o'clock in the afternoon of the seventh day after the presentation of the petition, by two persons, each in the sum of 250*l.*, or by one in the sum of 500*l.*, conditioned to be forfeited, unless *such persons* shall establish and prove to the satisfaction of the Committee that there was reasonable and probable ground for the allegation contained in the petition.‡ These recognizances are subjected to the same scrutiny with reference to their sufficiency, as those in the ordinary course of election petitions;§ and the Committee may, in their discretion, order the costs, charges and expenses incurred or occasioned in prosecuting the inquiry, to be paid by those proved to have been guilty of bribery, or of having brought forward frivolous and vexatious charges of bribery.|| All these matters, however, together with the simplified process for enforcing the payment of parliamentary costs, will be found explained hereafter.

* Post, p. 268, A.
§ Sects. 8—12.

† Sect. 4.
|| Sect. 15.

‡ Sect. 7.

CHAPTER XVI.

THE PETITION AND THE PETITIONERS.

THE Legislature has recently defined, with brevity and precision, what shall constitute an election petition, and declared who may be petitioners: but the practical consideration of these two matters necessarily involves details of great importance, disclosing clearly the grounds of policy on which the Legislature has latterly acted. It will not allow the members of one of its branches to be harassed by any speculative or malicious objector who may choose to make the attempt,* even though prepared to pay heavily for it; but confines the right of doing so to those who had voted, or had had a right to vote at the particular election complained of, and may consequently have been aggrieved by the alleged miscarriage: and to those who claim to have had a right to be elected and returned, or alleging themselves to have been candidates at the election. And the grounds of complaint are correspondingly restricted to the election, or return, and the matters directly and intrinsically affecting the validity of either. The second section of the Election Petitions Act, 1848, embraces both petition and petitioners. It declares that a document, to constitute “AN ELECTION PETITION,” must “complain,”

First, of an **UNDUE ELECTION, OR RETURN**, of a member to serve in parliament;—or,

* Previously to the Grenville Act (10 Geo. 3, c. 16), the restrictions on the right of petitioning, so far as regards those who may be petitioners, was identical with that of stat. 7 & 8 Vict. c. 103, s. 2; but the former act led to great oppression of members, by referring to a select committee “A Petition complaining of an undue Election or Return,” doubtless, inadvertently, without reference to the character or position of the petitioners. After eighteen years experience of the evils of this course, the statute 28 Geo. 3, c. 52 [A. D. 1788], was passed, restricting the right in the same way as stat. 7 & 8 Vict. c. 103, s. 2: the Election Petitions Act, 1848, containing a still further limitation upon the right of petitioning, as presently mentioned in the text.

Secondly, that NO RETURN has been made *according to the requisition of any writ* issued for the election of a member to serve in parliament ;—or,

Thirdly, of the SPECIAL MATTERS contained in any such RETURN.

And it must be *subscribed* by some person who,

First, VOTED at the election to which the petition relates ;—or who,

Secondly, had A RIGHT TO VOTE at that election ;—or,

Thirdly, by some person CLAIMING to have had a RIGHT TO BE RETURNED OR ELECTED at that election ;—or,

Lastly, alleging himself to have been A CANDIDATE at that election.

This definition of the characteristics of an election petition, it has been justly observed,* is of great importance, since no power is given to the House to apply the provisions of the act to petitions which contain merely *general* complaints against an election. The House may, indeed, appoint committees to inquire into the matters alleged in such petitions ; but unless they complain of *general bribery*, for which special provision is made by statute,† the inquiries can be conducted only according to the rules of *that House*, and without any sanction or powers from the law. The witnesses cannot be examined upon oath ; nor can the election or return be legally affected by any decision of the House. If it be found, after a petition has been presented, that it is *not* an ‘election petition’ within the terms of the act, the orders for further proceedings are liable to be discharged, and the petition ordered to lie upon the table ; or, which seems the proper course, the Election Committee, upon a preliminary objection, may refuse to entertain the petition.

The GROUNDS of the petition, which are above enumerated, are very extensive, including everything tending, directly or indirectly, by irregularity, violence, fraud, or corruption, of any description, to render either the *election*, in any of its stages, or the *return*, ‘*undue*.’ The election may have been in all respects according to law, but the return altogether erroneous and illegal, and in point of fact or law, or both, it may amount to no return at all, being intrinsically, or shown extrinsically by evidence to be, vicious. On the other hand, the return being

* May’s Law and Practice of Parliament, p. 443.

† Stat. 5 & 6 Vict. c. 102, s. 4, post, p. 269, A.

apparently sound in all respects, the election, of which it professes to represent the legally ascertained result, may have been altogether illegal, or partially so:—or both the election and return may be wholly illegal, and void.

Voters may have been improperly deprived of the right of exercising their franchise by the erroneous decision of the revising barrister; or may have been as erroneously placed by him in a position to vote, by being put upon the register. Those may have voted at the election who had no right to do so, having become disqualified since the register was completed. Voters may have been personated by others, or may have been bribed or ‘treated,’ in fewer or greater numbers. The *candidate*, again, may have been ineligible, or by his own illegal acts and conduct, or that of those for whom the law makes him responsible, may have rendered his own election void. The *returning officer* or his deputies, or all or any of the functionaries employed in conducting the various stages of the election, may have been appointed unduly and illegally, or, though duly appointed, may have miscarried, to a greater or lesser degree, in the discharge of their respective duties.* Interference, intimidation, violence, or corruption, may have prevailed to an extent nullifying everything that had been done.

Again, too few, too many, or the wrong persons, or none at all, may have been returned, or the return may be erroneous and deficient in form or in substance, or both, and that through either the mistake or misconduct of the returning officer.† So extensive and multifarious are the grounds on which an election or return may be impeached as “undue” on petition: at the same time, however, under restrictions and limitations requiring careful

* See, for instance, the *Belfast* case, in 1842, Barr. & Aust. 553, where the counsel for the sitting members admitted that four out of seven deputies of the returning officer had been *minors*, and also that the number of polling booths had been insufficient; and on both grounds acknowledged that he could not uphold the election, and submitted to its being declared void. N. B.—The reporters state that they had reason to know that the resolution of the committee, avoiding the election, proceeded on the latter ground alone. And, indeed, it would appear very questionable how far the former would have been a valid ground, *per se*, for avoiding the election.

† In the Appendix (pp. 449, A., 450, A.) will be seen an abortive effort of returning officers, in a special return, to excuse themselves from not having caused any members to be elected, on the plea of continued rioting; but the offended House could not be so propitiated, and committed them to Newgate.—(Ante, p. 225.)

consideration, before the serious expense and risk are incurred, of taking steps to do so. These are topics, however, to be discussed at large in the chapters relating to the Jurisdiction of Election Committees. With reference, again, to the persons entitled to become parties to election petitions, several very important matters suggest themselves for consideration.

I., II.—Under the act of 1844—stat. 7 & 8 Vict. c. 103—persons “CLAIMING THEREIN,” *i. e.* in the petition, “to have had a right to VOTE at the election to which the petition relates,” might subscribe and present it. By the Election Petitions Act, 1848, however, the right is restricted, as we have seen, as far as relates to voters, to those who had actually “voted, or HAD a right to vote” at the election. The distinction between the two cases, as respectively dependent upon the former and the present statute, is not immaterial, and indeed would seem to involve no little of the principle which governs the modern system of election law.—It will be observed, again, that the words of the second section of the latter act are in the disjunctive—‘some person who voted, OR had a right to vote;’ and the question would thus seem to arise, whether any one who actually *voted* at the election, in virtue of his name appearing on the register, may be a petitioner, irrespectively of his name having been placed or retained on the register, by the revising barrister, rightly or erroneously. His right to be so inserted or retained then underwent, or might have undergone, due scrutiny; yet if not the subject of ‘express decision,’ a Committee could not afterwards expunge the name from the register and poll-book, though it were clear that had the vote been objected to, it would have been omitted or expunged from the register, or erroneously retained. Had the vote been inserted, the voter would in strictness satisfy the statute by actually ‘voting:’ but so would one who had ‘voted’ fraudulently, by personating another: yet he surely could not be permitted to become a petitioner, as the law will not allow a man to take advantage of his own wrong. Supposing, again, one whose name stood on the register had, in the case of a county voter, on the 31st July in the current year, ceased to have the qualification annexed to his name in the preceding year’s register, or to retain so much of it as would have entitled him to be registered on that day:* or if, in the case of a borough voter, he had failed

* Stat. 6 Vict. c. 18, s. 79.

to reside within seven miles, from the 31st July down to the time of voting, it is clear that by the express enactment of the statute (s. 79, *infra*) he would have no right to vote;* but if, nevertheless, he actually voted, it may be asked, would he not be entitled to petition, as having, in point of fact, 'voted,' though without having had any *right* to do so? or would he be held disentitled, on the maxim, *nemo ex suo delicto, meliorem suam conditionem facere potest*? Yet he may have been unaware in fact, though he is taken to know *the law*, that he had lost his qualification; and the question whether he had or had not, may be one of extreme legal delicacy and difficulty to determine. If it be held that he has, *prima facie*, the right of petitioning, it may happen that the sitting member, whom by his petition he seeks to put to proof of the right to be elected or returned, may succeed in striking off his name from the poll and the register, and thus, whether at the earliest or any subsequent stage of the inquiry, reduce him to the position of a mere stranger, in point of law, to the election. Suppose, again, the revising barrister, by erroneously omitting or expunging a voter's name from the register, leave him only the right of tendering his vote, without its being counted,† and a Committee be of opinion that the name ought to have been placed or retained upon the register, and add it to the poll,‡ could it be said, that the person in question had, by relation, 'a right to vote at the election?' It would seem not; for the act negatives such right, except so far as it might perhaps be held inchoately to have existed, and been virtually exercised at the election, by the tender.—There seems nothing to prevent one who had a right to vote at the election, as standing rightfully on the register, from becoming a petitioner, though by accident or choice he did not actually vote. Finally, the act must receive at once a liberal and a reasonable construction, in order to effectuate the intention of its framers, as gathered from their language,—viz. to secure members of parliament from being attacked by others than those who had *bona fide* an interest in the election, and are aggrieved by its result; and it may perhaps be held that the word "voted" means "who lawfully voted." In practice, it is not likely

* See also *Pryce v. Belcher*, ante, p. 127. In this case, the court said that the statute had given a man the power of doing that which it had declared that he had no right to do!

† 2 Will. 4, c. 45, s. 59.

‡ Stat. 6 Vict. c. 18, s. 98.

that any one would be selected as petitioner, who would be liable to these objections; or at all events others would be associated with such an one, whose rights were unquestionable. If, however, there be any weight in the foregoing observations, they indicate the necessity of due consideration, before deciding on the persons who are to subscribe the petition—as by ascertaining that their names cannot be expunged, on a scrutiny, from the register or poll-book. It will be presently seen that Committees have properly required, and will doubtless continue to require the title of persons to petition to be distinctly, and even strictly, proved, if demanded, at the outset of the case.

It has been already stated, that under stat. 7 & 8 Vict. c. 103, s. 2, one who merely *claimed* in his petition to have had a right to vote, might petition; and the question might have been asked, whether this would be so, if he had taken no steps before the revising barrister to establish that right, if it existed: or even though he really had no such right at all, and never attempted to exercise it—relying on the mere fact of *claiming* such right, in his petition? Thus much, for the present, for persons entitled to become parties to petitions as Voters, *de facto*, or *de jure*.

III., IV.—The other classes of persons permitted to become petitioners consist of those CLAIMING to have had a right to be elected or returned,* or ALLEGING themselves to have been CANDIDATES at the election impugned.

(i) As to the former branch of this class, it will be seen that the legislature recognizes the mere *claim* of a right to have been elected or returned, though repudiating the mere claim of a person to have had a right to *vote*. The distinction between the two cases rests on substantial grounds, reference being had

* A person petitioning in respect of an election at one place, may become a candidate for another. It was resolved by the House, on the 16th April, 1727, “that a person petitioning, and thereby claiming a seat for one place, is capable of being elected and returned pending such petition.”—21 Journ. 136; 2 Roe, p. 110; Orme, 261 (n.) And a person elected and returned for one place, may petition upon a claim to a seat at another; nor will he be called upon to make his election as to his seat, till such petition be disposed of.—2 Roe, 110, note (b). Mr. May states, that if a petitioner, after his election, establish his claim to the disputed seat, the proper course will be to allow him to elect for which place he will sit, in the same manner as if he had been returned for both places at a general election. He adds that the point was considered in 1849, when such a case seemed likely to occur; but that there have been no precedents.—Law and Practice of Parliament, p. 437.

to the system so elaborately contrived to ascertain, long before the election, the validity of a claim to a right of *voting*; but there are, necessarily, no means of ascertaining beforehand the validity of a right to be elected or returned. The candidate need not declare himself till the very moment of being nominated; and as soon as the election is over, if he be not declared elected, or returned, his *claim* to be so necessarily lies over for the consideration of a committee. That 'claim' may, in reality, be without the least foundation; but it appears to give him a *locus standi* to assert, and to prove it, which he cannot do but by demolishing the right of his rival, and establishing his own in its stead. The petition is in fact the claim, and must be supported, by sufficient evidence, in the first instance, by him who prefers it. The allegation, therefore, of his claim, at once opens the whole question between him and his opponent, viz. which of them really *had* the right which one of them is thus driven to assert, or *claim*, by petition.

(ii.) One simply *alleging* himself to have been a candidate at the election, is also entitled, by the statute, to petition against the election and return. He must, of course, make such allegation truly; and then the question may arise—who is a candidate? In the case of *Morris v. Burdett*, 2 Maule & Selw. 212, Lord Ellenborough defined a candidate to be, "strictly speaking, and in the correct sense of the word, a person offering himself to the suffrages of the electors,"—and Mr. Justice Dampier—"one who voluntarily proposes himself, or adopts the proposal of others:" but the word 'candidate' used in stat. 2 & 3 Will. 4, c. 45, s. 71, signifies only one who goes to or demands a poll; not one who immediately after the show of hands declines to go to the poll.* A man may be clearly proposed and elected whether he will or will not, and without his knowledge, and must serve in Parliament;† but whether under such circumstances he could afterwards truly allege himself to have been a 'candidate' within the meaning of the second section of the Election Petitions Act may possibly admit of doubt. If, however, he can truly '*allege*' himself to have been a candidate, then, though not pretending to any right to have been elected or returned, he seems entitled, under the statute, to attack his success-

* *Muntz v. Sturge*, 8 M. & W. 310; post, pp. 247, 249, A. This definition has reference, in the case in question, only to liability for the expense of taking the poll.

† See *Morris v. Burdett*, *supra*, and post.

ful, though almost only nominal, rival, if for no other purpose than to procure the election and return to be declared void, with a view to himself or others becoming candidates at the new election.

Such being the four classes of petitioners, all four of them—voters *de facto*, or *de jure*, claimants to have been elected or returned, or mere candidates at the election—may offer evidence on all or any of the grounds above generally indicated, to induce the Committee to determine, in conformity with the statute, that neither of the sitting members, or only one of them, had been duly elected or returned, and that one or more of the petitioners, or some other person or persons, ought to have been elected and returned ;—or that the election was void ;—or that a new writ ought to issue.*

Such is the general course with reference to the *original* parties to an election petition ; but the Legislature has also made special provision for certain contingencies likely to be of frequent occurrence.

It may be, that *after* a petition has been presented, and *before* the appointment of the Select Committee, the Speaker is duly informed by certificate† of the death of a *sitting member* who had been petitioned against, or of one included in a double return, and so petitioned against ; or that such member has been summoned to Parliament as a peer : or the House may have resolved that the seat of any such member is by law become vacant ; or such member may, by writing subscribed by himself and delivered to the Speaker within fourteen days after the presentation of the petition, inform the House that it is not his intention to defend his election or return. In any of these cases the Speaker immediately notifies the fact to the General Committee and Chairman's Panel, and to the sheriff or returning officer of the place concerned : who immediately causes a copy of the notice to be affixed on or near the door of the county or town hall, or parish church nearest to the place where the election has usually been held. In addition to this the notice is ordered by the Speaker to be inserted in one of the next two London Gazettes ; and is also communicated by him to the House. Within fourteen days after the day on which the election petition was presented, or twenty-one days after the insertion in the Gazette of notice that the seat is vacant, or that the

* Sect. 86.

† See the form, post.

member will not defend his election or return, or on or before the second day on which the House meets after a prorogation, or an adjournment for the Easter or Christmas holidays, any person *who voted or had a right to vote at the election in question*, may petition the House to be admitted to defend the return or oppose the prayer of the petition. Upon this he will be admitted as a party together with the sitting member, if he be *then* a party, or in his room if he be not ; and the petition is then referred to the General Committee.* The sitting member having thus declined to defend his seat, whether from inability to bear the expense, or any other cause, is properly prohibited from appearing or acting as a party against the petition, or sitting or voting in the House till the Petition shall have been decided upon.†

The General Committee, on receiving the above-mentioned notice from the Speaker, suspend their proceedings on the petition in question, till twenty-one days after that on which notice has been inserted in the Gazette ; unless the petition of some person claiming to be admitted in the room of the member be sooner referred to them.‡ If, however, no person have been so admitted, then, if the conduct of the returning officer be not complained of, the General Committee is to choose the Select Committee as soon as conveniently may be, after the time has expired for persons coming in to defend ; and not less than one day's notice of the time and place of choosing the Select Committee is to be given in the votes ; nor will it be necessary to give to the Clerk of the General Committee a list of the voters intended to be objected to.§

While particular legislative provision has been made for the death of the sitting member at a particular period,—viz. between the presenting of the petition and the appointment of the Select Committee—none such seems to exist, to meet the case of the death of a sitting member *during the hearing before the Select Committee*. In the year 1836 the case arose in the *County of the City of Dublin* Committee :|| one of the two members, Mr. Ruthven, dying just after the sitting member had been placed in a minority upon the scrutiny. The counsel for the sitting member applied for an adjournment, and a report to the House of the death of Mr. Ruthven, in order that time might be given

* Sects. 18, 19.

§ Sect.

† Sect. 20.

‡ Sect. 47.

Falc. & Fitz. 151.

to electors to come in and defend the seat so become vacant;* on the ground that otherwise the interests of parties no longer defended must suffer: that the seat was not the private right of the sitting member, but the electors generally are concerned in seeing it properly filled, and ought not to be shut out from the investigation. The application was opposed on the ground that the House had not the power to do what was asked: and the Committee held that it was 'imperative on them in law, and demanded of them by the interests of justice, to proceed without adjournment.'

In the case of a *petitioner* dying during the hearing,—or after presenting the petition—being summoned to the House of Lords, or becoming otherwise disqualified for sitting in the House of Commons,—any petition claiming the seat for him as a petitioning candidate must, of course, so far, fall to the ground. There is an early case [17 February, 1772] of a sole petitioning candidate dying after presenting the petition, and *before* the hearing; on which the House discharged the order for hearing it—thereby, says Mr. Luders,† in effect adjudging the sitting member duly elected; without regarding the electors, whom no fault of their own had prevented inquiring into the election. He afterwards added,‡ that had the electors petitioned the House, stating the facts, and desiring to be heard, he doubted not that this application would have been entertained. Mr. Rogers, however, has judiciously remarked upon this case, that if electors choose to commit to the protection of another, rights in which they profess to be interested, and allow him to appear as the party *alone* interested, they subject themselves to all the contingencies which may affect him.§

There remains yet another class of cases to be noticed: namely, those where, on a Committee's having unseated a member on the merits of the *return* only, but without having entered into the merits of the *election*, he is permitted, but by special leave from *the House*, to petition in order to try the merits of the *election*.

(1). In the *Carnarvon case* [A. D. 1833], P. & K. 108, a deputy returning officer had entered a large number of tendered voters, distinguished by the words '*de bene esse*,' and cast them

* Under stat. 9 Geo. 4, c. 22, sects. 11, 12, 42.

† Vol. 1, p. 444.

‡ Id. p. 453.

§ See a registration case governed by the same principle, ante, p. 108

up, after discussion, with the good votes; his principal deliberately affirming his act in casting up the gross poll, in spite of remonstrances of the petitioner, who was thereby thrown into a minority of nine votes. The Committee decided that he ought to have been returned; but the Chairman moved the House that the sitting member should be at liberty to question the *election*, by petition within fourteen days. The House gave leave accordingly, after a short discussion, but without debate;* and the unseated member ultimately succeeded in getting himself reelected.

(2.) In the *Canterbury case* [A.D. 1835], K. & O. 134, the same course was pursued where several votes had been improperly rejected at the poll on the ground of variance of names, though *idem sonantia*.

(3, 4.) In two Irish cases, *Waterford* and *Athlone* [A.D. 1842], Bar. & Aust. 649, 668, where the returning officer had erroneously rejected votes, the same course was pursued: the Committees having refused to enter into the merits of the election by a scrutiny of the votes.

In the same year, in the *Belfast case*, Bar. & Aust. 554, a case arose which proved to be without precedent. Between the election, and the presentation of the petition, one of the petitioners, the Earl of Belfast, who had also been a candidate, was created a peer of the realm; whereupon it was moved in the House, that his petition, as being that of a lord of Parliament, should not be referred to the General Committee; on the ground that it would amount to a breach of privilege for a peer to interfere in an election. After considerable discussion, the House held itself bound, after having once "*received*" the petition, to refer it, in conformity with the statute, to the General Committee. As, however, there were three petitions, each containing the same charges and allegations, and one of the petitions was from electors only, the question whether Lord Ennishowen and Carrickfergus (formerly Lord Belfast) could be heard on a petition, became immaterial, and the point was not stirred before the Select Committee.

To obviate needless difficulties,—indeed to avoid suggesting them to an anxious opponent—it will be prudent to make, if possible, no persons parties to a petition in any of the prescribed capacities, who are liable to even the most captious exception.

† Mirror of Parliament, 6th March, 1833.

If voters, it will be easy to ascertain that they voted rightfully ; or that they had at the time of the election a clear right *to vote*, as in either case liable to no imputation of defective qualification, or loss of it, or personal incapacity. A person having a title as an elector, but incapacitated from voting by some personal disqualification, cannot legally become a petitioner, inasmuch as not being able to *exercise* his franchise, it is for these purposes the same as if he had none. The case in which this point arose was one, which will be presently noticed, of an alleged disqualification by bribery, but the same reason would hold in any other case of disqualification.* In the *Berwick* case [A.D. 1820], the Committee allowed the sitting members to show that the petitioners, who claimed "to have" a right to vote at all elections for Berwick, were disqualified.† Again, care should be taken to ascertain that the petitioner had done no act at the election compromising his right subsequently to petition. In the *Herefordshire*‡ case [A.D. 1803], the Committee refused, for instance, to allow petitioners to go on with a petition on the ground of bribery and treating, all of whom, seven in number, had themselves voted for the members petitioned against, after they knew of the distribution of the tickets by means of which the bribery and treating were effected. Thus, the Court of Queen's Bench will not permit one corporator to impeach the title of another if he have concurred in the election of that other, or acknowledged his title by acting with him—or if the objection which he makes be equally applicable to his own title, or to that of those under whom he claims.§ And moreover, though the relator, concurring at the time in the objectionable elector, were ignorant of the objection, that ignorance will not obviate the difficulty ; for he must be taken to know the contents of his own charter, and of the law arising from it.|| There is a distinction, however, between ignorance of *law* and of *facts*: and if the knowledge of the disqualifying *facts* did not come to the subscriber of an election petition, till after he had voted, a Committee, as suggested by Mr. Rogers, would not be justified in estopping a man by an assent given in ignorance:¶ at all events unless he had been

* Roe on Elections, 131.

† Rogers on Election Committees, 8 (n.)

‡ 1 Peckwell, 210.

§ *R. v. Cudlipp*, 6 T. R. 503.

|| *R. v. Trevenen*, 2 B. & Ald. 339.

¶ Rogers on Election Committees, p. 7, (n.)

guilty of gross and wanton laches, amounting to wilful ignorance.

So again, one who has signed the return of the member petitioned against, may be thereby estopped from petitioning against him : but it would be otherwise if the return so signed comprised both the member so petitioned against, and the others returned :—the return, though joint in form, being in legal contemplation and in effect, the several return of each member.*

So again, in the case of a candidate petitioning, it has been held an objection that he was ineligible, or disqualified, and consequently unable to take his seat in Parliament.† It seems to be a reasonable and recognized principle that none but those capable of sitting as members of the House of Commons can effectually become petitioners in the character of candidates ; inasmuch as it would be nugatory and idle that a person should contend for a decision in his favour, the advantages of which he could not reap in the general result.‡ An objection on this ground may hold good in respect either of some particular place, or generally of all places, and insisted upon accordingly. If these principles of the common law of parliament, be held still applicable to the right of petitioning defined by the Election Petitions Act, 1848, s. 2, 'the *'claim to have had a right to be returned or elected,'* must be read '*valid claim;*' and to the words '*alleging himself to have been a candidate,*' must be tacitly added '*then capable of sitting in the Commons House of Parliament.*'

If there be several or many petitioners, it will suffice if only one of them be duly invested with a title to petition : all the other names may be struck out from the petition.§ This is in conformity with the established rule of corporation law, that if

* *Weobly case*, 18 Journ. 181 ; *Warwick*, P. & K. 537 ; Rogers on Election Committees, 7, note (a).

† *Stamford* [A. D. 1677], a case of disqualifying office ; *Bedford* [A. D. 1728], the same ; *Honiton* [A. D. 1782], where the petitioner's former return was avoided for bribery. All these cases will be found in Roe on Elections, pp. 123—125. In *Sandwich* [A. D. 1808], and *Great Grimsby* [A. D. 1813], the committee decided that an unqualified candidate could not be heard.—P. & K. 169, (n.) In *Penryn* [A. D. 1827], the committee rejected the petition of a candidate, who had not, by taking the qualification oath when tendered, clothed himself with the legal character of candidate.—Rogers, 8, (n.)

‡ Roe, pp. 122, 123.

§ *Boston* [A. D. 1803], 1 Peck. p. 435 ; Orme on Elections, pp. 368, 369.

there be several relators applying for a *quo warranto*, the court will grant it, provided only one of them be unobjectionable as a relator, though all the others should prove disqualified.*

Assuming the petition to have been duly prepared in respect of its form—a matter which will presently be discussed—and of the petitioners by whom it is subscribed; and that it is indorsed by the Examiner with a certificate that the requisite recognizance has been entered into, or bank receipt or certificate taken for the amount, to have been otherwise secured by such recognizance, as already explained;† the next step is to present the petition to the House. For this purpose it is entrusted to some member, who, in conformity with the resolution of the House, affixes his name ‘to the beginning of it,’ and delivers it in at the table: where it is read, *without a question being put* thereupon.‡ If more than one, relating to either the same or different places, be presented *at the same time*, the Speaker directs them all to be delivered in at the table, and the names of the places to which the petition contained in the *first* of the under-mentioned five classes, if more than one, relate, written on so many pieces of paper, of an equal size; which are then rolled up, and put by the clerk into a glass, or box, and then publicly drawn by the clerk: and in the order in which they shall have been so drawn, they are read to the House, and the like method is observed with reference to the petitions contained in the remaining four classes.§

It may be useful here to state the *Standing Orders* on public petitions, as issued by the House of Commons at the commencement of the new Parliament of 1852.

“ Every member presenting a petition to the House must affix his name at the beginning thereof.

“ Every petition must be written, and not printed or lithographed.

“ Every petition must contain a prayer.

“ Every petition must be signed by at least one person, on the skin or sheet on which the petition is written.

“ Every petition must be written in the English language or be accompanied by a translation, certified by the member who shall present it.

* *The King v. Parry*, 6 Ad. & El. 810.

† Ante, p. 291 *et seq.*

‡ Resolutions, 6th Dec. 1774; 35 Com. Journ. 10.

§ Resolutions, 35 Journ. 16.

“ Every petition must be signed by the parties whose names are appended thereto by their names or marks, and by no one else, except in cases of incapacity by sickness.

“ No letters, affidavits, or other documents, may be attached to any petition.

“ No reference may be made to any debate in Parliament.”

The classification of petitions so presented is fivefold, and, as ordered at the commencement of the first session of the Parliament of 1852, in the following order:—First, those complaining of *no* return; secondly, of *double returns*; thirdly, of members returned to serve for *two or more* places; fourthly, of *returns* only;* fifthly, the residue of such petitions. These petitions are then dealt with by the clerk, in the way already explained.†

Every election petition must be presented within the period from time to time limited by the House for receiving such petitions,‡ as appointed by the Sessional Orders passed at the commencement of every session;—i. e. “ within **FOURTEEN DAYS next**” after the date of the Sessional Order;§ “ and so, within fourteen days after any return shall have been brought in.” Where, however, the return is questioned on the ground of **BRIBERY AND CORRUPTION**, and the petitioners **SPECIFICALLY ALLEGE** in their petition any payment of money, or other reward, by any member, or on his account, or with his privity, *since the time of such return*, in pursuance or furtherance of such bribery or corruption, it may be questioned at any time within twenty-eight days after the date of such payment—or, if the House be not sitting at the expiration of such twenty-eight days, within fourteen days after the next meeting of the House.||

* Mr. Luders says [A. D. 1785], ‘ I have not been able to discover with certainty when the House began to distinguish between the *return* and the *merits of an election*, on the trial of petitions.’—1 Controverted Elections, p. 404 (‘ Notes.’) Whether or not a given petition was against the *election*, as well as the *return*, became the subject of question in the *Caernarvon case*, P. & K. 109 [A. D. 1833]. It was argued that in form the petition was against both, and that it had been classed accordingly by the House amongst petitions against elections, and that, therefore, the counsel for the sitting member had a right, after admitting the badness of the return, to show that the election ought to have been in their favour. The sitting member was ultimately declared to have been duly elected, ante, pp. 309, 310.

† Mirror of Parliament (2nd Series), vol. i. pp. 58, 59 (21 Nov. 1837.) The sixteen election petitions presented on that day were all of the fifth class.

‡ Stat. 11 & 12 Vict. c. 98, s. 2.

§ 1 Peckwell, Introd. p. xxvii. note (x).

|| Sessional Orders, post, 453, A.

The first order which appears in the Journals for limiting the time for questioning returns to a fortnight, was made in the first parliament of Charles I., on the 18th February, 1625-6.* From the beginning of the Long Parliament in 1640, it was continued afterwards every new session; and since the year 1722 the limitation after a general election has always been a fortnight, as well as in the case of elections on an intermediate vacancy.†

The House is very strict, and with good reason, in requiring election petitions to be delivered within the periods which it thus prescribes. Such circumstances as “badness of roads, distance, and the absence of the petitioner in Portugal,” have been held insufficient to procure a relaxation of the rule, in favour of a petition not delivered to the clerk till the evening of the day on which the fourteen days had expired, *but after the House was up.*‡ Where, however, the House did not meet, or though it met, did not proceed to business, on the fourteenth day, it received petitions on the next day of its sitting.§ If the fourteen days expire during an adjournment, election petitions must be presented on the first day of meeting after the adjournment. The House will not depart from this rule in favour of a petition averring “an unforeseen and inevitable accident,” and “ignorance as to the time within which it was necessary to present the petition.”||

It has been seen that where ‘persons who voted, or had a right to vote, at the election,’ are admitted to defend a return generally, or in the particular case of a double return—or to oppose the prayer of a petition—it must be done within fourteen days after the election petition was presented, or twenty-one days after notice was inserted in the Gazette that the seat is vacant, or that the member will not defend his election or return.¶

On the petition being presented to and received by the House,

* Journals, vol. i. p. 821, col. 2.

† 1 Doug. Elect. Cas. Introd. (Notes, N.)

‡ 1 Doug. Elect. Cas. Introd., note O, p. 85; Votes, 20 Dec. 1774 (pp. 104, 105); 23 Dec. 1774 (p. 112).

§ *Northampton*, 1 Doug. 82; 8 Journ. 394; *Shaftesbury* and *Durham*, *Ib.*; and 1 Peckwell, Introd. 27; *Newcastle*, Journ. 36, 326; *Helleston*, 38 Journ. 330; *Liskeard*, 2 Peck. 334; *Downton*, 40 Journ. 445; 42, 150. See also Journ. 30, 445; 35, 447; 38, 298; 41, 610; 52, 150, 151; Rogers on Elect. Pet. 19.

|| *Seaford*, 1 Feb. 1781; 38 Journ. 163; 1 Peck. Introd. xxviii.

¶ Stat. 11 & 12 Vict. c. 98, sects. 19, 21.

it is referred by the House to the General Committee of Elections, as already explained.

As it would obviously be most inconvenient, and indeed oppressive and unjust, that a prorogation of parliament should in any way interfere with the regular adjudication upon election petitions;* the Election Petitions Act, 1848, contains provisions to meet the two cases of a prorogation intervening between the presentation of a petition and the appointment of the Select Committee to try it; and between the appointment of such Committee, and its reporting its decision to the House. *First.* It has been shown that no petition can be presented, nor consequently received by the House, till after the Examiner has ascertained and duly certified to it, that security has been given for the costs and expenses to the extent of 1000*l.* On this being done, the petition is forthwith referred to the General Committee on Elections.† If, however, parliament should be prorogued subsequently, and before the appointment of the Select Committee, the General Committee appointed in the next session, in case the sureties have been then reported unobjectionable, shall, within two days after their first meeting, appoint a day and hour for selecting a Committee to try the petition:‡ but if the number standing over be too great to admit of all the requisite Committees being selected within those two days, the General Committee are to arrange the appointments accordingly. *Secondly.* If parliament be prorogued after the appointment of

* The first reported case on this subject is to be found in Glanville [A. D. 1623], and the reasons on which the House acted, as reported by that learned and able reporter, (who was a Serjeant, and also Chairman of Privileges and Petitions), are very tersely and forcibly stated in his Reports, pp. 112—114. Mr. Rogers refers to this case as though the legislature had not provided for such a contingency, but had left it to rest on the common law of parliament; and consequently states that the petition must still be "*renewed in the next and in every subsequent session till it is tried*" (p. 20); citing a number of old cases as to the constituents of such renewed petitions, and the circumstances under which they will be allowed. It will be seen, however, from the provisions of the Elections Petitions Act, 1848, mentioned in the text, that all the trouble and expense of renewing petitions have been obviated, as indeed has been the case for many years. It would appear that Mr. Rogers had inadvertently relied on passages in 2 Roe on Elect. 148, published A. D. 1810, and Orme, pp. 333, et seq. [A. D. 1812.] It is not easy otherwise to account for his retaining pp. 20, 21, while subsequently reciting, *in extenso*, the important modern legislative enactments in question at pp. 44, 45.

† Election Petitions Act, 1848, s. 46.

‡ Sect. 50.

the Select Committee, but before they shall have reported their decision to the House, the Committee is not dissolved, but adjourned till twelve o'clock at noon on the day immediately following that on which parliament meets again for the dispatch of business.* So far from its being necessary to renew the petitions, as stated by Mr. Rogers, it is expressly provided that all proceedings of such Committee, and of any commission issued by it to take evidence, shall be of the same force and effect as if parliament had not been prorogued; and the Committee shall duly meet and sit from day to day, till they shall have reported to the House their determination on the merits of the petition.

It may happen that after a petition has been duly presented, and put in a train for adjudication, the petitioners may wish to **WITHDRAW** it: satisfied, perhaps, that it cannot be prosecuted with a reasonable expectation of success; or apprehensive of the heavy expenses to be incurred, and ultimately borne by them even in the event of success; or as the result of a lawful compromise of doubtful rights, with a view to future arrangements between contending candidates and interests. There may, however, be *unlawful* compromises,—guilty withdrawals of cases of corruption, from before Election Committees—which are not only, as it is superfluous to state, not permitted by the legislature, but entail very serious consequences on the parties, and also on the constituencies concerned. These cases have been already brought under our notice,† and have to be yet more fully considered.

The eighth section of the Elections Petitions Act, 1848, provides, in the class of lawful cases, that the petitioner may at *any time* after the presentation of his petition, withdraw it: on giving notice, in writing, under his own hand, or that of his agent,—*first*, to the Speaker; and *secondly*, to the sitting member or his agent; and *thirdly*, to any one admitted to oppose—that it is not intended to proceed with the petition. In such case, the petitioner will be liable to pay such taxed costs and expenses as may have been incurred‡ by the sitting member, or

* Sect. 88. Sunday, Good Friday and Christmas Day always excepted.

† Ante, p. 251.

‡ It would perhaps be held not necessary to prove that such costs and expenses have been actually *paid*: the word 'incurred' will be satisfied by the existence of a *bonâ fide liability* to pay them. See *Richardson v. Chasen*, 10 Q. B. 756. In that case a plaintiff averred simply

other persons complained of in such petition, and by any person admitted to oppose such petition. It was held in the *Athlone* case [A.D. 1842]* that if there be two petitioners, and one of them give notice to the Speaker of his intention to withdraw from the petition, that will not prevent the other petitioner from proceeding. This case arose under statute 4 & 5 Vict. c. 58, which required the petitioners, or some of them, to join in the recognizance; and the petitioner who withdrew was the only one who had entered unto the recognizance. The sureties however continued liable according to the condition 'for all costs and expenses becoming due from the person or persons signing the petition.' Under the Election Petitions Act, 1848, the sureties alone enter into the recognizance, which is conditioned for "all or any" of the petitioners paying the costs and expenses. The effect consequently of one petitioner—or all except one—withdrawing, is immaterial as far as concerns the liabilities of the sureties.

Assuming, however, that the petition is one intended to be persevered with to the last; that valid grounds exist for presenting it; that proper parties to it have been selected, and the preliminary securities duly completed; it becomes necessary to consider the form and structure of this important parliamentary document. Its sufficiency, in respect of both form and substance, can be inquired into before the Select Committee only; who are sworn to try "the MATTER OF THE PETITIONS referred to them." Unless all *form* be immaterial, alike whether expressly or impliedly prescribed by parliamentary statute or common law, a well founded objection to form must be taken at some time or other. It cannot be taken by the House, which has no jurisdiction to entertain the consideration of the petition which it has referred to the General Committee; nor by the Examiner of recognizances, whose functions are limited to the preliminary *security* to be given; nor by the General Committee, whose strictly defined jurisdiction excludes the matter in question. It must needs, therefore, be left, and is accordingly left, altogether, to the discretion of the Select Committee, who must dispose of the "matter of the petition" as best they may. This

that he had been "put to great expense" in investigating a title; and it was held that he might, under that averment, recover the amount of a bill of costs due to his attorney for investigating the title, though the bill had not been *actually paid*.

* Barr. & Aust. 662.

is the first step which they take in the exercise of their jurisdiction ; and will be fully discussed in the chapter appropriated specifically to that subject. It may, in the meantime, be intimated, that while no precise technical form of a petition has been prescribed, that instrument requires care to frame it properly, for its sufficiency is the *sine quâ non* of success in the parliamentary campaign. It ought to be prepared with a comprehensive circumspection, after its framer has deliberately reviewed the whole facts intended to be inquired into, as well as the evidence by which those facts are to be established. It is surely absurd to rely upon such as cannot be proved, either directly or presumptively ; for though there may be no moral doubt that the facts are as alleged, the Committee is sworn to decide “ according to the evidence : ” and it is a fixed rule of law, that where the court cannot take judicial notice of a fact, it is the same as if the fact had never existed : *de non apparentibus, et de non existentibus, eadem est ratio*.* A Committee, consistently with its oath, has no eyes to see a fact not legally evidenced before them. It is therefore necessary to ascertain beforehand that a complete series of the necessary facts is legally in existence : and then, to take care that the case which those facts are to support, be disclosed in the petition with due distinctness and precision, so as to bring it within the spirit and also the very letter of the law by which the adjudication upon those facts is to be regulated. A petition intrusted to a hurried, inexperienced, or incompetent hand, is almost sure to entail upon its unfortunate and blameworthy promoters, disappointment, vexation, discredit, and perhaps ruin. It ought to be drawn by one who imagines his astute opponent looking over his shoulder to detect a slip, arising probably from a superficial and indistinct perception of the facts themselves, as well as of the law applicable to them, and noting down the slip then and there, in order to trip up the petitioner by and by. Whenever the cause of petitioning—called, in common law, the cause of action—depends upon express statutory enactments, the petition ought to follow the language of these enactments as closely as possible ; its framer having an eye, at the same time, to the leading decisions of Committees as to the construction of those enactments. If it be really doubtful to what category the facts ought to be re-

* 5 Rep. 6. See Mr. Broom’s Treatise on Legal Maxims, p. 121 (2nd ed.)

ferred, the statement of them should be carefully varied accordingly, and by way of distinct independent allegation. It must be borne in mind that the essence of a petition is—a COMPLAINT; and the alleged grievance must be stated distinctly and pointedly *as such*,—that is, be specifically brought forward by way of complaint; not as a bungling draftsman might do, by way, for instance, of loose recital only. The petition, in short, ought to be *totus teres atque rotundus*: to disclose persons and facts distinctly: petitioners, in their proper characters and rights, and facts, according to their real legal significance. And the prayer ought to be for that full, specific and appropriate relief which is really sought for.

The governing principle in framing a petition is, to state so much, and in such a manner, as will deprive an opponent of the opportunity of alleging truly that he has been misled, and has consequently come unprepared to meet the case which is proposed to be supported by evidence. An opponent is presumed to have prepared himself to answer nothing but what is alleged. Were another rule to be adopted it is easy to see that a man might always be at the mercy of a cunning adversary, who would deal in artful suppressions and elastic variations, so as to conceal and disguise the real merits of the case. *Dolus semper versatur in generalibus*: a maxim of the civil law constantly cited and applied in courts of law and equity. An acute Committee will be sure to give weight to such considerations: and may ask a question, perhaps not easily answerable—‘If you meant this, why did you not say it?’

Finally. It is to be observed, as an incentive to vigilance and caution, that a man must stand, or fall, by his petition as presented, and submitted to the Select Committee: for it is “well and truly to try THE PETITION referred to them” that they are sworn—not that which may be from time to time varied by its promoters. And though a Committee may perhaps disregard what they may possibly choose to consider mere clerical errors, not capable of having misled, there are on record many cases showing the rigour with which they have dealt with that fundamental document—a petition.* Those interested in it, and

* It will of course be highly imprudent to allow the petition to appear with erasures or interlineations. The very least inconvenience would be, a committee’s requiring rigid proof that the erasure or alteration had occurred before the petition had been signed, and that it had

responsible for its sufficiency, must prepare for all kinds of objections occurring to their opponents in the exigencies of a difficult, and perhaps desperate case. In the *St. Alban's Election Petition*, [27th March, 1851], the counsel for the sitting member endeavoured *in limine* to get rid of the petition altogether, by the objection that "it did not state on the face of it, to what tribunal it was addressed, inasmuch as the words "*To the Commons of the United Kingdom in Parliament assembled*," or words to that effect, were omitted. The Committee, however, overruled the objection, by discreetly advertng to the fact that the Petition, such as it was, had been *received by the House*: a fact sufficiently designating it as a petition to the House of Commons.*

These are matters, however, which may fitly be reserved for consideration in the Chapters appropriated to the "JURISDICTION OF COMMITTEES."

been then read to the parties, as it subsequently appeared before the committee. In the *Lyme Regis case*, Barr. & Aust. 456, the petition appeared with an interlineation thus: "disqualified . . . by reason of their being employed in the duties of the [*post office*], excise, customs, or other duties or revenues:" the words in brackets being those which had been interlined. The Committee, after deliberation, resolved that the petitioners must either account for the interlineation, or the Committee would read the petition as if the interlined words were not in it. It is clear that a Committee, dealing lightly with such cases, would be simply offering a premium on slovenliness, and opening wide a door to fraud.

* Printed Minutes, p. 2.

CHAPTER XVII.

LISTS OF OBJECTIONS TO VOTERS.

THIS chapter, it must be borne in mind, relates to objections to individual votes in the case of a scrutiny, and not to the lists of names and places requisite in general cases of bribery and treating, in pursuance of the usual preliminary resolutions of each Committee. And with reference to a scrutiny, moreover, this chapter relates only to the *removal* from the poll of votes successfully impugned by either party, not to the *addition* of votes contended to be valid: this last topic being adverted to in a separate chapter. It may be observed, however, in passing, that lists of this last class of voters must also be interchanged between the parties, and handed in to the Committee, in conformity with the long-established practice of Committees, though it seems not to have been made the subject of any statutory provision.

The 'List of Voters intended to be objected to' is a document of equal importance with the Petition, and requires great care in the preparation of it. The fundamental statutory requisite* as to the character of it is, that in the said lists must be given the several *heads of objection, distinguishing the same against the names of the voters excepted to.*" When it is borne in mind that the fate of a ruinously-contested petition may depend upon a single vote, and that again exclusively upon the sufficiency with which an objection to it is indicated in the Lists of Objections, nothing more need be said to ensure anxious attention to accuracy. And besides this, there is no telling how a Committee may exercise such discretion as it is necessarily invested with in the matter. Different Committees have taken widely different views of the extent of their right to entertain a given objection, on the sufficiency of its designation in the lists being impugned before them. In the year 1838, before the *Salford*†

* Election Petitions Act, sect. 55, post, 341, A.

† Falc. & Fitz. 263.

Committee, nearly an entire list of objections was invalidated, and the petition consequently abandoned, because the petitioners happened to have referred to the wrong number of the voter on the register, though it was that which had been placed by the returning officer opposite to the name in the printed list!

Those intrusted with the preparation of this document should remember that the Select Committee has “well and truly to try *the matter* of the petition referred to them;”* and that “their determination shall be *final* between the parties to all intents and purposes.”† Whatever view, therefore, they may take of any objection offered to their consideration of the structure of either the petition, or its accompanying lists of objections, cannot be subjected to revision. Under these circumstances it were folly indeed to leave any latitude for erroneous adjudication by departure from the plainly-prescribed requisites of the statute law: but neither is it to be expected that a Committee will look with eagle’s eyes to discern minute errors and defects for the purpose of only illustrating the maxim — *qui hæret in literâ, hæret in cortice*.

The four sections in the Election Petitions Act relative to the Lists of Objections are, the 55th, the 72nd, the 74th, and the 92nd. These provide substantially as follows. The lists of the voters intended to be objected to must give the several heads of objection, distinguishing the same against the names of the voters excepted to; these must be delivered in to the clerk of the General Committee; these lists are referred by the House, with the petition, to the Select Committee; which, with any Commission issued by it, is forbidden to receive any evidence against the validity of *any vote not included in one of the lists* of voters delivered to the General Committee, or upon any head of objection to any voter included in any such list other than one of the heads *specified against him in such list*; and if the Committee be of opinion that any ground of objection was frivolous or vexatious, they shall report it to the House, and the opposite party shall in such case be entitled to receive the full costs and expenses incurred by reason of such objection from the party *on whose behalf* it was made. It is necessary, therefore, for a petitioner first to consider whether a proposed objection be a valid one in point of law, and whether, in point of fact, it

* Election Petitions Act, sect. 68.

† Ditto, sect. 86.

can be sustained by evidence; secondly, to *specify* and *distinguish* it against the voter's name in the list. In these requisites are involved correctness in the name* and description of the voter, and especially in respect of his *number on the Register*, together with a pointed and precise statement of the objection intended to be insisted upon. This is for the purpose at once of guiding the Committee, and of enabling the opponent to meet the case fairly and fully, and deprive him of any pretence for alleging that he has been misled by a vague, defective, or erroneous statement—one, moreover, which may have been perhaps designedly such. It is better to be over-scrupulously precise than hazardously compendious; for it is a topic often strenuously urged on Committees, that it is hard for a voter to be disfranchised on technical grounds not brought forward with technical sufficiency, and that, if there be any leaning, it ought surely to be *in favour* of the franchise. Were Committees to be lax in enforcing accuracy in these cases, they would fritter away the just and beneficial provisions of the statute, open a wide door to fraud, and offer a premium on negligence. As a specimen of the nature of such objections, reference may be made to the *Belfast* case,† [A.D. 1838]. The objection there specified in the list was, that the voter had been, “at the time of the election, employed in *the collection of the revenue* :” the real objection being, that he had been employed by the Post Office as a *letter carrier*; but the Committee refused to entertain the objection to the vote. So, on the other hand, in the *Weymouth* case‡ [A.D. 1842], the names of six voters were bracketed together, and against the bracket was written simply: “To each and every of these votes the heads of objection stated above, in Class No. 2, will be urged.” Mr. Talbot contended that this was not a sufficient ‘*specifying against* the particular voter:’ Mr. Austin argued that there had been, if not a literal, a substantial compliance with the statute, and at length the Com-

* In the *Galway* case [A. D. 1833], 1 P. & Knapp, 525, the list stated the name of the voter objected to as “W. Miller.” In fact it was “William Mitten,” and, at the suggestion of the committee, the objection to the vote was abandoned as soon as counsel had intimated the variance. It is probable that this had been only a clerical error in copying; but it was hardly a case of *idem sonans*, and the error might have misled.

† Falc. & Fitz. 604.

‡ Barr. & Aust. 108.

mittee interfered to say that 'the list was sufficient in point of form.' It would indeed be idly cumbrous and expensive to repeat the heads of objection against each individual name.* When votes, however, are thus referred to classes, or "heads of objection," all the greater care must be taken to secure correctness in respect of *each particular name*—as to whether it ought really to stand there, and *can be proved* liable to the specified objection; diligence herein being stimulated by recollecting the penalty of costs. Practically speaking, however, some risk is, and almost always must be, incurred, by inserting names merely at a venture, as far as regards having made them the subject of distinct individual investigation. It ought to be borne in mind that the difficulty of obtaining evidence is generally great; and it has most frequently to be sought for in the enemy's camp. The lists and the petition should be adjusted to each other accurately: that is, the former must warrant the latter. An objection, or head of objection, not falling within the scope of the petition, obviously cannot be entertained.

A useful form of 'Lists of Objections' will be found in the Appendix. It was used in the second *Harwich* Election, 1851; is carefully drawn, and of comprehensive application. At the foot of it is also a list of the names of voters proposed to be *added*, together with the grounds alleged in support of the claim.

There is one case in which no lists of voters intended to be objected to, need be given in to the clerk of the General Committee—namely, in that provided for by the 52nd section of the Election Petitions Act,—which enacts, that if notice of the death, or vacancy, of any seat of any member petitioned against, or that it is not the intention of such member to defend his election or return, shall have been inserted in the Gazette by order of the Speaker, and no party shall have been admitted to defend such election or return; then, if the conduct of the returning officer be not complained of in such petition, it shall not be necessary to insert such petition at the bottom of the then list of petitions—but the General Committee shall meet for choosing the Select Committee to try such petition as soon as

* In the *Lyme Regis* case [A. D. 1842], Barr. & Aust. 462, opposite to the name of the voter was written only a reference to the objection stated against the name of *another* voter. This also was held to be sufficient.

conveniently may be, after the expiration of the time allowed for parties to come in and defend such election or return, and not less than one day's notice of the time and place appointed for choosing such Committee shall be given in the votes; and in such case it shall *not* be necessary to deliver to the clerk of the General Committee a list of the voters intended to be objected to. In all other cases, however, the parties complaining of, or defending the election or return, must, by themselves or agents, deliver in to the clerk of the General Committee the lists of voters intended to be objected to, not later than 6 o'clock, P.M. on the sixth day next before the day appointed for choosing the Committee to try the petition; and the clerk shall keep the list so delivered to him in his office, open to the inspection of all parties concerned.

It is necessary, finally, to bear in mind that the 74th section of the Election Petitions Act, peremptorily prohibits the Select Committee, and any Commission issued by it, from receiving evidence against any vote not included in one of the lists of voters delivered in to the General Committee in the manner above prescribed.

CHAPTER XVIII.

JURISDICTION OF THE SELECT COMMITTEE— SCRUTINY—ORIGINAL AND APPELLATE.



THE statutory definition of the jurisdiction of a Select Committee of the House of Commons for the trial of an Election Petition, is to be found, as will have been already seen,* in two sections of the Election Petitions Act, 1848.—By the 68th section, it is declared to consist of “the MATTER OF THE PETITION referred to it;” and by the 82nd section it is enacted, that in order to constitute such a Petition, it must “*complain*,”

(1) Of an “undue Election;” or

(2) Of an “undue Return;” or

(3) That “no Return has been made, according to the requisition of any writ issued for the election of a member to serve in Parliament;” or,

(4) Of “the special matters contained in any such Return:”† by which, it is conceived, are meant those matters of excuse, such as loss of poll-books, &c., which the returning officer may venture to allege for not making a due return to the writ.

Premising that the jurisdiction thus defined will be found of a twofold character, Original and Appellate, as will presently be explained, it is obvious that the first matter within the scope of that jurisdiction is the Petition itself,—its form and substance, as originally *received* by the House; referred by it to the General Committee; by that Committee returned to the House, annexed to the Report of the names of the members constituting the Select Committee; and by the House finally referred to that Select Committee, on its being sworn at the table of the House “well and truly to try the matter of the petition referred to them, and a true judgment to give, according to the evidence.”

* Ante, p. 301.

† The fivefold classification of election petitions, by the House, will be found ante, p. 313.

It is for the House, in the first instance, to receive or reject a petition, professing to be an Election Petition,—or one which the House may deem to be such,—for inadmissibility through noncompliance, for instance, with the conditions prescribed by the Election Petitions Act, or with the Sessional Orders. Thus on the 19th November, 1852,* a petition was presented to the House, not in the character of an Election Petition, but professing that its object was to pray inquiry into the conduct of a right honourable member of the House, with reference to the Election for the Borough of Derby, at the General Election of 1852. The member presenting it gave notice that his object was to found a motion upon it, for the consideration of the House. The petition purported to be that of “Electors of the borough of Derby who had voted at the last Election;” and *alleged* “that the *return* of one of the members had been *procured* by illegal and corrupt means, and by an organized system of bribery, which had been resorted to, and successfully carried out, for the purpose of procuring, and which *did procure*, the return.” The petition then “*prayed*” the House “to institute a full and searching inquiry into “*the allegations of this petition*, and into the proceedings of the Right Honourable Gentleman in question, with reference to the last Election for the borough of Derby.” The Speaker, however, pronounced this to be a petition containing allegations complaining of an ‘*undue return*,’ and consequently coming within the meaning of an Election Petition: and as it was not indorsed, as required by the statute, by the Examiner of Recognizances, it could not be ‘received,’ and no motion founded on it could be entertained.† The petition was consequently withdrawn. It is to be observed that this petition did not in precise terms of the statute ‘*complain*’ of ‘an undue return,’ but it *alleged* that the return had been procured by illegal and corrupt means, and ‘*prayed*’ the House to institute an inquiry into the ‘allegations’ of the petition, as well as into certain alleged proceedings connected with the return. Had the petition been duly indorsed by the Examiner, and so referred to the Select Committee, it would then have become a subject for discussion before that committee, whether the petition was one satisfying the conditions of the statute, as a “*complaint*,” and not vitiated by the introduction of collateral matters. On the 23rd November, another petition was

* Hans. vol. cxxiii. 254.

† Id. p. 256.

presented to the House by the same member, signed by persons professing to be '*inhabitant householders* of the borough of Derby,' alleging, with circumstantial details, that at the last election 'an organised system of bribery was had recourse to, in defiance of the laws of the land, and to the great scandal of the petitioners'—and that a right honourable member of the Government and of the House of Commons 'was a party to such system of bribery'—which was totally at variance with his position in the Government and the House; and '*praying* the House to institute a full and searching inquiry into the proceedings' of the gentleman in question, 'with reference to the last election for the borough of Derby.' There had also been presented to the House a petition from Electors of the borough, duly complaining of an undue return, on the same grounds, among others, disclosed in the two above-mentioned petitions, which on the 29th November was made the subject of a motion, founded on an elaborate statement of the circumstances of the case, for a Select Committee to inquire into the matter of the petition. It will be observed that the petition was denuded of those incidents of its predecessor which had brought it within the definition of an election petition: it was not from the parties, nor did it 'complain' of the matter specified in the 2nd section of the Election Petitions Act, 1848. In answer to the motion, a grave objection was raised by Mr. Stuart Wortley,* against the House acceding to the motion. An election petition, relating to the same transaction, was pending, which would necessarily bring that transaction before a judicial tribunal of the House—a Select Committee; and it had been the policy of the Legislature, ever since the Grenville Act, to take from the jurisdiction of the House at large, all matters connected with elections, and refer them to a more impartial tribunal. If the facts stated in the petition then before the House were true, the election and return were void, and would be so adjudged by the Select Committee: but if the motion before the House were to be acceded to, the case of one of the parties before the Select Committee must be disclosed, to the great prejudice of a *bonâ fide* dispassionate inquiry before that tribunal. It might also afford a dangerous precedent—encouraging political partisans to come to the House on the same sort of hybrid petition then before it, and at the same time presenting a real election petition:—and thus, by means of

* Hans. cxxiii. 745.

the other petition, try what could be done before an unsworn committee, by cross-examining and torturing parties, in order to extract statements which they had not a right to extract. To this Mr. Walpole, the Home Secretary,* answered, that the right of the House to inquire into bribery was independent of the statute law,—that they had an independent right to make such inquiry as they should think fit, for putting a stop to bribery—and moreover, that the House had a right to entertain any charges which might be made against one who was a member of both the House and the Government. If a due case for inquiry were established, it made it the duty of the House to examine into it; and it could be done without violating any constitutional privilege, of either members or the House. Though the inquiry now sought for might possibly operate on the election petition, and be so far inconvenient, it *ought* not to bind the committee, nor in any way to influence it in discharging its judicial duty. It was a choice of evils, and the lesser one seemed to be that to which the House was then asked to submit. It was also to be observed that the right honourable gentleman whose conduct was impugned, had himself courted the inquiry, and had both the privilege and the right to have the matter fully inquired into, with a view to setting himself right with the House. Lord John Russell concurred in the Home Secretary's view of the constitutional aspect of the question. If a specific case could be alleged against a person holding high office, and if it were a bar to inquiry by a committee of the House that an election committee had been appointed, that would be a great evil, and a bar to the performance of justice. The House of Commons had great functions to perform, which could not be set aside by any statute.† It was ultimately agreed, in a very full House, that a Select Committee, to consist of five members, should be appointed, chosen by the General Committee of Returns.‡ With due deference to such high authorities, it may be doubted whether this resolution of the House, dealing with unquestionably a very special case, may not afford an inconvenient and mischievous precedent, such as that alluded to by Mr. Stuart Wortley. No one can doubt the inherent and inalienable right

* Hans. cxiii. 747.

† Ibid. p. 749.

‡ The General Committee selected the following:—Mr. Goulburn, Lord Harry Vane, Viscount Barrington, Sir William Molesworth, and Mr. Deedes.

of the House of Commons, vindicated by Mr. Walpole and Lord John Russell; while all must own the serious inconvenience which was acknowledged by the former to exist, viz., almost unavoidably anticipating and prejudicing a pending grave judicial inquiry by a tribunal constituted by members of the House. Without further discussing the matter, it may be observed, that the ends of justice and the purity and dignity of Parliament might have been deemed effectually secured, by giving precedence to the judicial inquiry by the Select Committee, before whom all the facts might have been satisfactorily elicited, and on oath: and if the matter alleged in the petition on which was founded the motion for a Special Committee, should be established, the Select Committee might have reported the special matter to the House, and recommended further inquiry; or the House might, of its own motion, have ordered an independent inquiry into the conduct of one of its members, as disclosed by evidence reported to the House. This view of the case, however, was not presented to the House, except by a casual suggestion of the member who proposed the motion; and the decision at which the House arrived, has certainly established a most important precedent, one lying on the very line of right, and at least apparently infringing the great salutary principle on which was founded the Grenville Act. It happened happily, in the present instance, that the whole House entertained the unusual application in a grave and temperate spirit befitting such an assembly; but it might have been far otherwise; and so a glimpse might have been suddenly afforded of such revolting scenes as called forth the Grenville Act. When the House had received a petition, and duly referred it, as an election petition, to the Select Committee, it was held by a committee, in the year 1851,* that though the petition did not state on the face of it to what tribunal it was addressed, inasmuch as it altogether omitted the words “to the Commons of the United Kingdom in Parliament assembled,” the fact that the petition had been *received* by the House, sufficiently designated it to be a petition to the House of Commons. In the same year, it was objected, before another Committee,† that there had been no proof of the signatures of the two petitioners; but it was successfully answered, partly on the grounds urged in the former case, that

* Ante, p. 322. *St. Albans*, 1851. Printed Minutes, p. 2.

† *Harwich (Second)*, 1851. Printed Minutes, p. 4.

the petition having been regularly referred to the committee by the proper authorities, must be treated by the Committee as regular—the time for inquiring into its regularity being before reference to the Select Committee. It seems difficult to reconcile this case with principle, or with other recent cases decided by election committees: for it has been properly held, in more than one instance, that the opponents of a petition may call upon the petitioner to establish the truth of his allegation, that he is a person entitled to petition, as one who had either “voted,” or had “had a right to vote” at that election to which the petition relates; or “claimed to have had a right to be returned or elected;” or “alleged himself to have been a candidate at the election.”* In the first place, the sufficiency of the *allegation* of these matters must be decided by the Select Committee, on objection taken. If, for instance, the petition stated merely that the petitioners “*claimed to have had a right*” to vote, that (whatever might have been the amount of proof requisite to sustain such claims) would have been sufficient, as we have seen,† under stat. 7 & 8 Vict. c. 103, s. 2, but might be held to disclose, on the face of the petition, no right to petition within the Election Petitions Act, 1848, which is in terms restricted, as far as relates to elections, to those who either ‘*voted*’ or ‘*had a right to vote.*’ It is not likely, however, that those entrusted with the preparation of the petition will fail to adhere to the few and distinct requisites prescribed by the statute; and probably only those persons will be selected to sign the petition who will, *ex majori cautela*, satisfy both conditions—of having ‘*had a right to vote,*’ and exercised that right in point of fact. In the second place, the right of petitioning must be the subject of inquiry, somewhere; and it cannot be by the House at large, or the General Committee, for then they would be trying ‘the matter of the petition,’ which, nevertheless, has, in conformity with the statute, been devolved by them upon the Select Committee. Were this otherwise, the whole of the existing machinery for the trial of election petitions would be deranged, and the House, for instance, entangled, on the presentation of every election petition, in preliminary discussions concerning the ‘right’ which an elector had to vote—whether he had voted in point of fact, or whether he satisfied the other requisites pre-

* Election Petitions Act, 1848, s. 2.

† Ante, p. 306.

334 JURISDICTION OF THE SELECT COMMITTEE—

scribed by the statute. These are matters plainly within the exclusive province of the Select Committee, before whom those various points may be started which have been glanced at in a preceding chapter.*

It has been properly observed, that a Select Committee is the *legitimate* tribunal before which objections to both the form and the substance of petitions, ought now to be taken: and that any attempt to restore the old practice of discussing controverted elections and returns in the House, is an infringement of the Grenville Act, and a violation of the present constitution of Parliament.† Again—the 2nd section of statute 7 & 8 Vict. c. 103, enacted that no petition should *be received* “by the House,” unless signed as prescribed by the Act: while the corresponding section of the Election Petitions Act contains no such negative clause, but enacts simply that the petition, in order to “be deemed an election petition,” “shall be subscribed” by the specified parties: but the negative clause is applied, in section 7, to an election petition not indorsed by the certificate of the Examiner of Recognizances—in which case, “no election petition shall *be received*.” If, therefore, a petition purport to be duly signed,‡ it must be ‘received’ without further inquiry, when indorsed by the Examiner, and afterwards dealt with by the Select Committee; the only authority competent to deal with the matter.

It is to be observed, that the statute 7 & 8 Vict. c. 103, s. 4, following the provisions of statute 28 Geo. III. c. 52, s. 2, confirmed the right of petitioning on those “*claiming therein*,” [*i. e.* in their petition] “to have had a right to vote; or ‘*claiming therein*’ to have had a right to be elected or returned; or “ALLEGING themselves to have been candidates;” in all the three cases, the title of the petitioners being alike, ex-

* Chap. xvii.

† Rogers, Law and Practice of Election Committees, 11. *Athlone*, [A. D. 1842], Barr. & Aust. 662. In the *Belfast case*, [A. D. 1842], *Id.* p. 553, it was held by the House (as seen ante, p. 310), on debate, that it was made *imperative* on the House to refer to the General Committee all petitions which had been received by the House. They therefore did so in a case where between the election and the presentation of the petition the petitioner had been *created a peer*.—*Id.*

‡ It is of course the duty of the member presenting the petition, reasonably to satisfy himself as to the *bona fides* of it; of which the assurance of the parliamentary agent would be, generally speaking, a sufficient guarantee.

pressly, required to be alleged *in the petition*. In the Election Petitions Act, 1848, the only departure from the stat. 7 & 8 Vict. c. 103, s. 4, in respect of petitioners, is in the definition of the first of the three classes—which empowers those electors to petition, who “VOTED—OR HAD A RIGHT to vote” at the election: but the Act does not expressly require either fact to be stated *in the petition*. The Act does not, like its predecessor, expressly require the ‘claim to have had a right to be returned or elected’ to be made in the petition; but the having been a candidate is a fact which he is required simply “*to allege*”—that is, in the petition. The prevalent mode of stating the right of petitioning, adopted in the petitions of 1847-8, under stat. 7 & 8 Vict. c. 103, s. 4, and which will presently be generally intimated,* it may be useful to take the same course with the extraordinary number of petitions—one hundred and nine—presented in November, 1852, under stat. 11 & 12 Vict. c. 98, s. 2. Twenty-two† allege the petitioners to be ‘registered *electors, who claimed* at the election to have had, and *had a right* to vote, and *did* vote.’ Some of these, as in Nos. 16, 20, 27, “claimed to *have* a right to vote.” Thirty-one‡ aver that the petitioners were “registered electors, and *had a right* to vote, and *did* vote.” One§ alleges that “the petitioner *claims* to have had a right to vote at the time of the election, and was at such time, and has since continued to be, and is still, an elector of and voter for the borough, and as such had a right to vote, and did vote.” Three|| allege that the petitioners ‘were registered electors, entitled to vote, and did vote.’ One¶ states that the petitioners were ‘registered electors, and claimed *to have*, and had a right to vote.’ Three** allege simply ‘that they were electors, and voted.’ One,†† that the petitioners were, at the time of the election, “electors, and did claim to have a right to vote, and did exercise such right by voting.” Another,‡‡ that

* Post, p. 337.

† Nos. 4, 11, 16, 20, 27, 32, 36, 42, 43, 44, 45, 55, 62, 83, 89, 90, 92, 94, 98, 102, 106, 117, *Votes* for November, 1852.

‡ Nos. 5, 8, 9, 15, 19, 21, 22, 29, 31, 33, 41, 52, 56, 57, 58, 60, 61, 65, 69, 71, 74, 77, 80, 81, 84, 88, 95, 97, 103, 108, 109, *Votes*.

§ No. 51, *Votes*.

|| Nos. 2, 13, 48, *Votes*.

¶ No. 64, *Votes*.

** Nos. 47, 76, 100, *Votes*.

†† No. 30, *Votes*.

‡‡ No. 14, *Votes*.

‘they were registered electors, and now are, and had a right to vote, and did vote.’ One* says that the petitioner “is and *was* an elector of, &c., and had the right, and was entitled to vote, and did vote” at the election: while another† adopts the same description, omitting only one of the superfluous allegations. One‡ asserts that the petitioner was “a duly registered elector, and had, *and claimed* to have had a right to vote.” Another declares that the petitioners “are and were registered electors, and had a right to vote, and did vote.”§ Two|| state that the petitioners “were registered electors, and had a right to vote;” two,¶ that the petitioners had a right to vote, and voted:” one, that the petitioner “was a registered elector, and voted;”** another, that the petitioner *is* a voter, and was *entitled* to vote.”†† One avers that the petitioner was “an elector, and voted, and was a candidate;” ‡‡ a second, that he “was a candidate, and had a right to be returned and elected, and was duly elected:”§§ a third, that he “was a candidate, and claims to have been duly elected by a majority of the legal voters:”||| while twenty-seven allege themselves simply to have been “candidates,”¶¶ It certainly seems singular that the gentlemen who drew many of these petitions should have thought it necessary, in those framed under the Election Petitions Act, 1848, to insert a petitioner’s “*claim* to have a right to vote, as if the petition had been drawn in accordance with the repealed stat. 7 & 8 Vict. c. 103, s. 4; and also that the words of the statute now in force were not adhered to, by stating simply that the petitioners “voted,” or “had a right to vote,” or, at all events, “voted *and* had a right to vote”—according to the facts. Whether it be necessary to allege, at all, the right of an elector to petition, would seem to be settled by the uniform practice, which affords evidence that such is the common law of Parliament. It may perhaps be held, that provided a petition contain a distinct allegation, satisfying either alternative right,—in respect of voting, or having

* No. 67, *Votes*.

† No. 93, *Votes*.

|| Nos. 70, 87, *Votes*.

** No. 91, *Votes*.

†† No. 63, *Votes*.

||| No. 3, *Votes*.

¶¶ Nos. 7, 10, 12, 17, 18, 23, 24, 25, 26, 39, 40, 46, 49, 50, 53, 54, 59, 66, 68, 73, 78, 79, 82, 86, 96, 99, 105, *Votes*.

† No. 72, *Votes*.

§ No. 85, *Votes*.

¶ Nos. 2—101, *Votes*.

†† No. 104, *Votes*.

§§ No. 37, *Votes*.

had a right to vote,—it will suffice ; and will not be impaired by the addition of irrelevant, superfluous, or insufficient allegations. *Utile per inutile non vitiatur.*

The following case may serve as an example of the questions which may arise before the Select Committee, as to the allegation, and proof of, the title of a petitioner.

In the *Chester* case (1848) the petitioners stated that they were “registered electors for the Northern division of the county of Chester, and had a *right* to vote, and *did* vote, at such election :” and the counsel for the sitting member insisted that the Committee were bound to inquire into all the allegations of the petition ; and required it to be proved that the petitioners “had a *right* to vote, and *did* vote, at the election.” It will be observed, that that question arose under stat. 7 & 8 Vict. c. 103, s. 2, which conferred the right of petitioning on “some person *claiming therein* to have had a right to vote.” After argument and deliberation, the committee determined that the petitioners must prove “that they *had a right* to vote at the last election, before prosecuting further the inquiry ;” and strict proof was then given of the identity of the two petitioners with two voters of their name standing in the register and on the poll ; the property in respect of which they voted, and where situate ; and their residence. No proof was given of their voting, beyond that supplied by the fact of their names standing on the poll-books. The counsel for the sitting members thereupon admitted that the petitioners had established their right to be such. In this case, it might perhaps have been held to suffice for them to have “claimed” in their petition “to have had a right to vote :” but they alleged that they “*had* a right to vote, and *did* vote.” Many of the petitions in that year, and under that statute, alleged that “the petitioners *had* and *claimed* to have had a right to vote :” “that they were electors claiming and having a right to vote :” others followed the form used in the *Chester* election petition. Some alleged that the petitioners “were electors, and had a right to vote, and did in fact vote :”—some that they “were electors ; registered as such ; and had a right to vote ; and did vote.” These and other variations show some degree of incertitude in the minds of those who had drawn the petitions, as to the language of the act then

* *Chester*, 1848. Printed Minutes, i. 46.

in force. In the Election Petitions Act, 1848, the language is, “who *voted*, or *had* a right to vote:” and the question under that act would appear to be, whether an allegation in either alternative would not satisfy the statute now in force: the proof of such allegation depending upon the considerations already indicated. In the same year in which the *Chester* case arose, that of *Harwich*,* which was previous to the former one, it was objected that the petitioner was not entitled to become such, because, though in point of fact he was on the register and had voted, yet he had had no right to do so, owing to non-residence: that his being on the register entitled him to tender his vote at the poll, but did not make his vote a good one: and the objection was declared to be founded on stat. 6 Vict. c. 18, s. 79, requiring residence down to the time of voting. The petition stated the petitioner to have been an elector registered as such, that he had a right to vote, and did vote; and he also described himself as ‘claiming to have had a right to vote.’ The committee, however, decided that as he had “*claimed* to vote, and had actually voted,” it was sufficient, and the case must be proceeded with. Here again, the claim alone would, it is admitted, have sufficed under stat. 7 & 8 Vict. c. 103, s. 2, and the *actual voting*, under stat. 11 & 12 Vict. c. 98, s. 2; subject to the points discussed in the preceding chapter, already referred to, appearing to render it doubtful whether a *mere de facto* voting will satisfy the latter statute. If, then, the petitioner’s *locus standi* before the Select Committee may be thus questioned, as it seems clear that it may be, on what principle can another material fact, that of his signature to the petition, be beyond the jurisdiction of the Select Committee, so as to relieve him from proof of the fact, where it is required? In the language of the Select Committee appointed to report to the House concerning the alleged forgery of a signature to the *Aylesbury* election petition, in 1851, “the signature to an election petition is the *foundation* of an important judicial proceeding.† In the years 1689 and 1774, it was resolved by the House “that *all* petitions presented to the House, ought to be signed by the petitioners *with their own hands*, by their names, or marks”—and that “it is highly unwarrantable, and a breach of the privileges of the House, for any person to set the name of any

* *Harwich*, 1848, Printed Minutes, 1; P. R. & D. 72.

† Report, p. 4.

other person to any petition presented to the House.” Numerous cases are to be found in the Journals, of references to the Committee of Privileges and Elections, to inquire whether the petition was signed by the petitioner, and under what circumstances,* and these Journals contain many cases of petitions rejected on account of the signatures having been improperly affixed. In the case above referred to,† this matter became the subject of appeal to the House; which appointed a committee to inquire into the mode in which the signatures to the petition against the member for Aylesbury had been obtained; and as their report to the House, calling its attention, pointedly, to the above-mentioned resolutions of 1689 and 1774, expressed their opinion that one John Strutt had not had the authority of the petitioner to sign his name, the conduct of the former and another person concerned had been “highly culpable,” the House severely reprimanded those who had been guilty of such misconduct. It may, however, well be doubted whether, in addition to the House, thus interfering to vindicate its privileges and punish those who are guilty of a breach of them, it be not open to the opponents of the petition to show before the Select Committee, that it is in fact *no election petition at all*—being destitute of that justly pronounced to be its “*foundation*”—as not signed by those only entitled to sign it; and consequently that the Select Committee has no jurisdiction to entertain it. Were this otherwise, a Committee might go on for a great length of time trying the merits of an election or return, brought before it by means solely of forged signatures; and the second section of the Election Petitions Act, 1848, which peremptorily enacts, that an election petition “*shall be subscribed by some person*” clothed with the requisite qualification, would thus become a dead letter. The forgery of the signatures may not be discovered till after the petition has been referred to the Select Committee: but as soon as it is discovered, it seems only just to give effect to the objection, regard being had to the public interests, and the whole policy of our election laws. Thus in the *Nottingham* case,‡ the title of the petitioner was not impugned till after the merits of the petition had been under consideration for more than five days: but the objection was entertained, very ably discussed,

* Rogers' Law and Practice of Election Committees, 8, note (a).

† *Aylesbury*, 1851.

‡ A. D. 1819, Corbett & Daniel, 197.

and proved successful. This case arose on statute 28 Geo. 3, c. 52; sect. 1 of which conferred the right on ‘some person or persons claiming *therein* to have had a right to vote at the election’—being identical with the provision contained in stat. 7 & 8 Vict. c. 103, s. 2. The petition stated the petitioners to be “electors and persons having a right to vote, and who did vote at the last election for the *said town and county* :” and that at the last election “for the town and county *of the town* of Nottingham,” &c. : but in the writ and return the election was stated to be for “for the *town* of Nottingham.” The objections were, first—that the petition did not disclose that the petitioners were persons having a right to vote for *Nottingham*—the word “said” having reference grammatically to the immediate antecedent, ‘the city of London,’ where the petitioners were described as residing. Secondly, that the petition stated the election to have been for “the town *and county of the town* of Nottingham,” whereas it ought to have been “for the *town* of Nottingham” only. The Committee determined that the petition was not conformable with the statute, and that the petitioners should not be allowed to proceed. This case, though one *strictissimi juris*, is a decisive authority to show the jurisdiction of committees to entertain such objections, and that at any time. It is true that these are in the nature of preliminary objections, and ought to be made promptly, or satisfactory reasons assigned for not doing so : but even now it is worthy of consideration whether the Select Committee is not bound to give effect to a valid objection, going to the very foundation of their jurisdiction. If the committee be satisfied that the objectors have been negligently or designedly lying by, so as to occasion a needless expenditure of the parties’ time and of money, there may be modes of dealing with such a case in a manner to prevent its recurrence. If it be known, on the other hand, that effect will be given to a well grounded objection of this kind, whenever discovered, it will be likely to quicken the vigilance of those presenting petitions, so as to avoid affording any ground for such objection, instead of opening a wide door for negligence and fraud.

Thus much for the petition ; with which the Select Committee has to deal in the first exercise of its *original* jurisdiction. To follow the order of time, however, in the progress of those events with which Election Committees have to deal, it

may now be convenient to advert to the *appellate* capacity of the Select Committee, and afterwards complete the consideration of its extensive original jurisdiction.

The appellate jurisdiction of the Select Committee has been strictly and advantageously circumscribed by recent legislation. The tribunals in respect of which this appellate jurisdiction exists, are the courts of the revising barristers, in England and Wales, of the assistant barristers in Ireland,* and the sheriffs, and sheriffs' courts of appeal in Scotland.†

I. ENGLAND AND WALES.—The legislature has been very anxious to confine the discussion of, and adjudication upon, the rights of voters, to the court of the revising barrister, for reasons made amply evident in several preceding chapters. He is invested, for that purpose, with ample powers, and is required, 'upon the hearing, in open court, *finally* to determine upon the validity of claims and objections,‡ with the same powers, and proceeding in the same manner, as the returning officer did previously to the year 1832.' To rectify any miscarriage of the revising barrister, however, in point of law, and of law alone, the Court of Common Pleas has been constituted a court of appeal, whose decisions are final, 'and conclusive on the point of law adjudicated upon,' and binding on *every* Committee of the House of Commons 'appointed for the trial of *any* election petition.'§ It is, at the same time, left to the revising barrister to grant or refuse an appeal to the Court of Common Pleas, according to his discretion; and he may have exercised a very faulty discretion in refusing to grant a 'case.' The register is 'conclusive evidence that the persons therein named *continue* to have the qualification annexed to their names in the register in force at the election,' subject to two exceptions respectively applicable to county and borough voters:‖ yet it is obvious that the right of voting may have been allowed, or disallowed, by the revising barrister altogether erroneously. To meet such a contingency, it is enacted that, first, in the case

* Ante, p. 57.

† Ante, p. 43.

‡ 6 Vict. c. 18, s. 41.

§ Ante, p. 137. The right of voting is not affected by an appeal pending at the time of issuing the writ of election; nor will the poll or return be altered or affected by any subsequent decision on such appeal. Stat. 6 Vict. c. 18, s. 69, post, p. 299, A.

‖ Sects. 79, 98.

342 JURISDICTION OF THE SELECT COMMITTEE—

of a person whose name stands on the register, having been SPECIALLY RETAINED or INSERTED in it, by the EXPRESS DECISION of the revising barrister;—and secondly, in the case of a person whose name does not appear on the register, but who tendered his vote at the election, his name having been *EXPUNGED, or OMITTED from the register, by the EXPRESS DECISION of the revising barrister:—it is in these two cases open to the Select Committee to inquire into and decide upon the *right to vote*, of any person so situated, equally in the case of an existing alleged statutory or common law *incapacity*, as in any other case of alleged want of right to be registered. Incapacity arising subsequently, falls, as will be seen in the next chapter, within the original jurisdiction of the Select Committee. The retention, or insertion of the name, and the omission of or expunging it, must be proved to have been so done *specially* by the *express decision* of the revising barrister. This is a question of fact, to be ascertained by evidence of what took place in his court. The case must be shown to have been one out of the ordinary course—i. e. not the mere insertion, or retention, as it were, *sub silentio*, but specially, after the right had been challenged and discussed, so as to call for the express *decision* of the barrister. Were this to be otherwise, the register would no longer be final, and the statute 6 Vict. c. 18, which is in that respect partly declaratory, rendered nugatory. If this express decision be given, then the name is “*specially* retained, inserted, omitted, or expunged,” and may become the subject of similar discussion before the Select Committee, on a scrutiny. It was properly decided by the committee in the first *Harwich* case 1851,* that, before they could enter into the case of any vote decided upon by the revising barrister, they would “require *evidence* that the vote was thus specially retained, or expunged,” [or omitted] “from, or inserted in the list by his” [express] “decision.” The natural source of such evidence would appear to be the revising barrister himself, who should produce his note-book, in which it seems reasonable to expect that he has made memoranda from which he might speak with confidence as to the fact of any name having been “*specially*” dealt with by him by means of an “express decision.” If, for instance, he were to enter the particular name in his book, and add the words “specially inserted or retained,” or

* Printed Minutes, p. 77.

“expunged” or “omitted,—by my *express* decision,” it would greatly facilitate the proof before the committee; and it is difficult to see any good reason for this not being done. Some revising barristers* have objected, before committees, to being called as witnesses, because the situation of revising barrister was a judicial one; others have given their evidence “under protest:”† but it is conceived that neither protest nor objection is called for by either decorum, or necessity; inasmuch as there seems no pretence for considering the act of giving evidence before a committee of the British House of Commons, an act in the slightest degree derogatory to the highest judicial character of a witness. The late Vice-Chancellor of England, Sir Lancelot Shadwell, attended in the Court of Queen’s Bench, a few years ago, in the case of *Duncombe v. Daniel*, when summoned as a witness, for the purpose of stating, in support of a plea of justification to a libel, a circumstance which had occurred before him,—in fact, an observation made by him, when acting judicially in his court. He raised no question such as some of the revising barristers have felt it their duty to raise, nor objected to being freely examined and cross-examined by counsel—the late Sir William Follett, and the present Lord Campbell. It is true that in the year 1838, Mr. Justice Patteson‡ advised a grand jury not to examine one of their number as a witness, on a bill for perjury which was before them, arising out of a trial that had taken place at the quarter sessions, on which occasion the grand jurymen had presided as the chairman. “It is a new point,” said that learned and able judge,—“but I should not advise the grand jury to examine him. He was the president of a court *of record*; and it would be dangerous to allow such an exhibition. The judges of England might [as well] be called on to state what had occurred before them in court.” It will be observed, however, that the court of the revising barristers of England and Wales is *not* a court of record, as that of the assistant barrister of Ireland is;§ and indeed there do not ap-

* As in the first *Harwich case*, Printed Minutes, pp. 75, 77, 139.

† As in the *Wigan case* [A. D. 1842], Barr. & Aust. p. 188. It seems superfluous to say that the notes of a revising barrister, not examined, are inadmissible as evidence, *per se*, of what had taken place before him. See *Wilde’s case*, *Rochester*, K. & O. 72. Their use is, to assist his memory, if he be called as a witness.

‡ *Reg. v. Gazard*, 8 Car. & P. 595.

§ 13 & 14 Vict. c. 69, s. 57, post, 121, A.

pear to exist any such reasons of public policy, for not examining a revising barrister, as may exist in the case of a judge of a court of record. The general rule is, that the public has an interest in any evidence that exists, and a right to call for its production; and the only question can be whether a particular case fall within the rule, or within any exception to it; and the present does not seem to fall within either. The right thus occasionally set up before a committee of the House of Commons, would hardly be claimed in one of the courts of law, nor be allowed, if claimed, where it was sought to prove, by the revising barrister, a material fact pertinent to the issue, which had occurred in his presence, and while he was exercising his mingled judicial and ministerial functions. Supposing the case of a prosecution for perjury * committed before him, or an action for penalties for a wilful contravention of statute 6 Vict. c. 18, it seems strange to suppose the evidence of the revising barrister unattainable, and in the ordinary way, namely, by counsel's examination and cross-examination. To inquire of him as to the *grounds* or *reasons* of his judgment or decision, is of course quite another matter, and would not be attempted. With reference to the point now under consideration, the revising barrister is moreover the very best that could be called, if he have made proper notes. In the first *Harwich* case (1851), a revising barrister of seventeen years' standing as such, on a question being asked as to whether he had or had not struck out a particular name, stated, "I have not the slightest recollection of what actually did take place;" and after deliberation on the facts of the case, as they were left on the evidence, the committee was compelled to come to the following resolution:—"That the evidence adduced before the committee has not established *the fact* that the votes of John Cobbold and John Chevalier Cobbold were specially retained on, or expunged from, or inserted in, the register, by the express decision of the revising barrister." † This seems, undoubtedly, most unsatisfactory; and it is to be hoped that means may be taken to prevent the recurrence of such an inconvenience. As the revising barrister said to the committee on that occasion, 'the act of parliament required that he should adjudicate, in order that the jurisdiction of the committee should arise.' He added, that if the evidence should

* 6 Vict. c. 18, s. 41, post, 289, A.

† Printed Minutes, p. 86.

be insufficient, he should be happy to state that ‘he did or did not adjudicate;’ and indeed the language of the legislature sufficiently indicates to the revising barristers, that it expects them to enable themselves to afford such evidence, for so important a purpose. It will at all events be prudent for any competent party concerned at, or interested in, the revision to take an accurate note of what occurs, with a view to subsequent use before a committee, whenever any insertion, retention, omission, or expunging ‘specially’ occurs, as the subject of an ‘express’ decision. As soon as proof of such express decision has been given, the committee is empowered to inquire into and decide upon “*the right to vote*”—generally: not into the right precisely as it had been set up before the revising barrister in point of evidence, but into “*the right*” itself, as it existed, at the time, in point of fact and law. By this, however, it is not to be understood that a voter may rely, before a committee, on a right of voting totally different from that set up before the revising barrister. If, for instance, the claim before the latter has been in the capacity of a 50*l.* occupying tenant, in the case of a county voter, he could not be heard before a committee, to support his right to have voted as a 40*s.* freeholder. It is obviously just that he should be bound by the claim, which he had thought proper to present for the revising barrister’s adjudication. Were this otherwise, great frauds might be perpetrated with impunity. The “right to vote” must be that which had been the subject of the “express decision” of the revising barrister, not one of which he knew nothing, and respecting which therefore he could have decided nothing. The words of the statute* are general, having none limiting the inquiry to that which had occupied the attention of the revising barrister; and accordingly in one of the most recent cases, that of the first *Harwich* [1851], the committee held that “they would inquire as to, and decide upon, the right to vote, *generally*.”† It might have been of course otherwise, had the statute said,—for instance,—‘it shall be lawful for the Select Committee to examine into, and decide upon, the propriety of the express decision of the revising barrister in so specially inserting, retaining, omitting, or expunging the name.’ As the act stands, it seems to have contemplated investing a committee with the right exercised by the Harwich Committee. Various committees, previously to

* Sect. 98.

† Printed Minutes, p. 148.

that of Harwich, however, a more restricted view of their jurisdiction—regarding the Select Committee as strictly a court of appeal from the *particular decision* of the revising barrister, and not entitled to examine into points which were not brought before him: some going even so far as to restrict the *evidence* before them, to that which had been adduced before the revising barrister. This latter course seems totally at variance with principle, and the provisions of the act of parliament; which gives the committee unlimited power to deal with “the right to vote,”—a matter to be ascertained by all legitimate adducible evidence, or great injustice may be done. Documentary evidence may be producible before a committee, which had been out of reach at the time of revision; or that which had been offered before the revising barrister, may since have been mislaid or lost. And so with respect to witnesses, who may have died, or become physically or mentally unable to give evidence: and a witness may have forgotten facts, when before the revising barrister, which before a committee can be satisfactorily established by either himself, or other witnesses: and one disbelieved or contradicted before the revising barrister, may be believed by, and supported and confirmed before, a committee. The majority of committees have acted in conformity with these principles. As to being restricted to the same point or ground of objection, it is possible that a claim or objection was really invalid on several grounds, only one of which was known, or adduced, at the time of the revision: but if the committee be bound to inquire into, and decide upon, ‘*the right to vote*,’ are they to shut their eyes to, it may be, four or five fatal objections, any one of which would destroy that right, and then leave the name, or possibly two or three hundred other names similarly situated, upon the register, and consequently upon the poll, as those in respect of which “the right to vote” had been inquired into, and decided?

If the revising barrister can be shown to have come to an erroneous decision of a question as to the validity of a claim, or a notice of objection, in point of form, by allowing or disallowing either, it appears settled that a committee can then deal with the vote claimed or objected to, as the revising barrister would have been bound to deal, had he come to a correct decision concerning the form of claim, or notice of objection. There are several cases of this kind decided differently by committees; but on principle, there seems no difficulty in holding

that if there was an 'express decision' on the case, then the committee may 'inquire into, and decide upon, the right to vote,' which may have been improperly allowed or disallowed by the revising barrister.

A question, again, may arise, as has just been seen, whether there have been, in point of fact, an 'express decision'—or even any decision at all. In accordance with the suggestions offered above, however, means ought to be taken to prevent any such question arising; all parties in the revising barrister's court, advertng to the possible future necessity for being provided with distinct evidence of a '*special*' retention, insertion, or omission, or expunging of a name, and as the result of an '*express* decision.'

It will be right to come before the committee provided with all proper documents, and instruments of evidence, e. g. claims, notices of objection, the lists signed by the barrister, and the register, whether originals or copies; and if any of the originals necessary to be produced be not forthcoming, the ordinary steps must be taken to provide secondary evidence, which can be rarely a matter of difficulty. In such cases of scrutiny, a committee is, as it were, turned into a revising barrister's court, as it was the substitute for that of the old returning officer,* the only question before it being—the right to vote, as alleged to have existed when before the inferior tribunal. Where the case is that of a vote tendered at the election, by a voter whose name had been expunged or omitted from the register by the express decision of the revising barrister,† the course to be adopted by the voter, and the returning officer, or his deputy, has been already explained, as depending upon the 59th section of the Reform Act.‡ If the tendered vote have been duly entered, the fact of such tender is established by producing the poll-book. As suggested in the passage referred to, however, and in order to avoid difficulty, in the event of the tender having been in fact made, but not appearing recorded on the poll, it will be prudent for the voter to make the tender in the presence of one who can afterwards corroborate his statement upon a committee. In the *New Windsor* case§ may be seen an instance of the difficulties which often arise in making out a case of tender; especially when the election is being carried on amidst excitement and uproar.

* Post, stat. 6 Vict. c. 18, s. 41, p. 290, A. † 6 Vict. c. 18, s. 98.
‡ Ante, pp. 216, 217. § K. & O. 164—173.

We have seen that the Court of Common Pleas declined to allow the decisions of committees to be quoted as authority;* and on the other hand, in one of the most recent cases before an Election Committee† [in 1851], the chairman, after announcing the usual preliminary resolutions, proceeded to say, ‘That the committee had further instructed him to inform counsel, that they hoped that in conducting their case, counsel would confine themselves, with reference to points, as far as possible to the quotation of *legal, and not parliamentary decisions.*’ This is a satisfactory and salutary course of procedure, having regard to the present altered footing on which stands the administration of election law. It now depends, to a very great extent, upon the statute law, and the decisions of the Court of Common Pleas, which have defined and expounded the ‘right to vote’ in harmony with each other: the former having made the decisions of the latter final and conclusive on points of law, and binding on every committee for the trial of any election petition complaining of an undue election or return of members to serve in parliament for England and Wales.‡ In the fourth, fifth, sixth, seventh and eighth chapters of this work will be found a statement of that portion of election law applicable to the subject now under consideration; and at the close of the work will be found a careful digest of the decisions of the Court of Common Pleas since the year 1843, together with the chief justices’ returns to the House of Commons of their decisions, and the facts on which they were made. There can be no doubt of the disposition of every Election Committee to pay a hearty and dignified deference to these judicial expositions, in obedience to the statute; while they are at liberty to deal freely with the decisions of previous or contemporaneous Election Committees, who have not, in many cases, had adequate opportunities for arriving at such satisfactory and consistent conclusions, as would be entitled to rank as authoritative precedents. This remark may appear the more entitled to weight, on considering the authoritative intimation of the chairman of the Aylesbury Committee, just quoted; and also the great alterations in both the general and election law, which have been made since the majority of such committee decisions were given. Where the facts

* *Whithorn v. Thomas*, 7 M. & G. 3; post, 363, A.

† *Aylesbury*, Printed Minutes, p. 7.

‡ 6 Vict. c. 18, s. 66.

of a former case, however, are substantially identical with those of the one under consideration, and neither the statute law nor the Common Pleas' exposition of election law affords sufficient light for guidance, respectful deference should be paid to the decision of a preceding committee, and the greater, in proportion to the degree of care with which the decision had evidently been given. A recent case may be thought to illustrate the propriety of these observations. A revising barrister had decided, in 1850, that *an extra glut tide waiter* was not incapacitated to vote, as a person employed by the Commissioners of Customs. His name was accordingly retained on the register, and he voted at the election for Harwich in March, 1851. In the ensuing May, his right to vote was challenged before the Harwich Committee, who decided that he had a right to vote;* and in a very recently-published work, that decision is cited as still an authority in parliamentary law. In the ensuing November that identical case was brought before the Court of Common Pleas, on appeal from the decision of the revising barrister, and his decision the court unanimously *reversed*.† even holding the point to be so clear, that they said the respondent had exercised a sound discretion in not appearing to support that decision.—Thus much for the appellate jurisdiction of the Select Committee, in respect of cases arising in England and Wales.

II. IRELAND. A Select Committee has precisely the same appellate jurisdiction in the case of decisions of the assistant barristers of Ireland, as in those of the revising barristers in England and Wales. The 104th section of statute 13 & 14 Vict. c. 69,‡ is identical, *mutatis mutandis*, with the 98th section of stat. 6 Vict. c. 18.

The judgments or decisions of the Court of Exchequer Chamber in Ireland are alike final, conclusive and binding on Committees, with those of the Court of Common Pleas at Westminster.§ Nothing more, therefore, is necessary here on that subject.

* Printed Minutes, pp. 28 et seq.

† Ante, p. 147; post, p. 370, A.

‡ Post, p. 139, A.

§ Sect. 79, post, p. 131, A.

III. SCOTLAND. It has been stated, in previous parts of this work,* and as a subject of regret, that the legislature has not hitherto thought fit to place the electoral law of Scotland on the same footing as that on which the electoral laws of England and Ireland now stand, with reference to constituting a superior court of law a final court of appeal from the decisions of the sheriffs, and the Sheriffs' Appeal Courts. Had the proposal made in the House of Commons in the year 1852,† been carried into effect, for appointing the Court of Exchequer in Scotland to be an ultimate Court of Appeal, doubtless the enactments would have been accompanied by provisions like those contained in the acts for England and Ireland, restricting the jurisdiction of Committees to those cases which had been the subject of *special* insertion, retention, omission or expunging, by the 'express decisions' of either the Sheriffs, or the Sheriffs' Court of Appeal—if indeed the latter tribunal would not have been almost necessarily superseded by the new Court of Appeal. How far, therefore, the register of voters in Scotland is now liable to be opened before a select Committee, would appear to be as questionable at the present day as it was in the year 1832; with this qualification, that the few and not satisfactory or consistent cases of Scottish election petitions which alone have come before select committees, seem to show that there has been a disinclination to re-open the Scottish register. Committees appear to have been perhaps needlessly embarrassed by the existence of the Sheriffs' Court of Appeal, and the fact of its having, or not having, been resorted to, before subjecting the validity of a particular vote to the consideration of a committee. Those committees, however, should fix their eyes on *the plain words* of the statute.—Perhaps the best mode of viewing the case would be, to start with the inherent jurisdiction of the House of Commons in such cases, anterior to and independently of statutory limitation; and then to ascertain how far the legislature has gone, in abridging that jurisdiction. It is an established principle of the common law of England, that the jurisdiction of the superior courts shall not be taken away, except by the express positive words of a statute or necessary implication;‡ a proposition admitted to its fullest extent by the

* Ante, pp. 27, 43.

† Ante, pp. 27, 28.

‡ Per Tindal, C. J., *Alban v. Pyke*, 4 M. & G. 424.

late Sir William Follett, in his elaborate argument in the *Oxford* case. *

In the 25th section of stat. 2 & 3 Will. 4, c. 65, special care is taken to provide that ‘nothing therein contained shall be held to *limit or restrain* the powers of a committee to take into consideration the validity of *any vote or claim for registration, admitted or rejected* by the sheriff or the judges of appeal:† and immediately before this negative proviso, occurs another—that no alteration of the sheriffs’ judgments, by either the courts of review or other judges of appeal, shall affect the merits of any election *actually completed* and carried through before the date of such alteration, *except* in so far as effect may be given to *such alteration* by any committee to which a petition against the election may be referred. It would seem that words could not more plainly indicate the intention of the Legislature to leave intact the jurisdiction of a committee, in the cases specified—namely, ‘any *vote or claim for registration admitted or rejected* by the sheriff or the judges of appeal.’ Nothing contained in the act is to “limit or restrain the powers of a committee to take into consideration the validity of any such vote or claim.” Here the existence of such powers is fully recognized, and the act is not to *limit or restrain* those powers. What, then, is meant by a *vote or claim, admitted or rejected* by either the sheriff, or those who can review his decision as a court of appeal?

The following is the process by which claims are admitted or rejected by the sheriff, and his decision confirmed, varied, or reversed by the sheriffs’ court of appeal.

If a claim have not been objected to, and be supported by a written title *primâ facie* evidencing the validity of the claim, the sheriff writes on the claim the word “*admit:*” but if there be no written title, or one which he deems unsatisfactory, he ‘summarily’ inquires into and examines evidence, on oath. If he deem the claimant to have established a *primâ facie* case, the sheriff writes on the claim, as in the former instance, the word “*admit:*” and if he be not satisfied, he writes “*reject*”—in either case adding his initials.‡ He then proceeds to ‘consider and hear the parties on the claims which are objected to, and

* P. & K. 86 [A. D. 1833].

† Post, p. 25, A.

‡ Stat. 2 & 3 Will. 4, c. 65, s. 17, post, 18, 19, A.

writes “admit” or “reject,” as before, according to the conclusion at which he may have arrived. If a *prima facie* case of objection be made out, the sheriff rejects the claim, if no one have appeared to support it; and if no objector appear, the sheriff admits the claim, if of opinion that a *prima facie* case has been made out in support of it.* The sheriff makes a note of the fact or law involved in his decision on claims or objections,—and the evidence; and any appeal from his decision is restricted to the ‘ground of fact or of law named in that note.’† Once a year he ‘examines and corrects his registers,’‡ in respect of any ‘mistakes or omissions in the name, residence, or condition of any person already registered, or otherwise:’ and the sheriff must give ample further notice in the newspaper of greatest reputed circulation in the shire, to all persons intending to claim to be registered, or to object to the title of any voter already on the register, to give in their claims, titles, and objections. From these provisions it seems difficult to deduce the inference that the sheriff cannot entertain objections to the right of a voter to have his name *continued* on the register; and that his annual revision of an existing register is to be exhausted by the correction of petty technical mistakes and omissions, while the fact is notorious that the name ought either never to have been placed on the register at all, or ought no longer to continue there. The language of the act ought to be invincibly strong, before it is held that such was the intention of the Legislature. It is idle for the sheriff to give notice to persons ‘intending to object to the title of any voter already on the register,’ if, when the objector comes, provided with proof of loss of qualification, he be told that the voter’s title is absolutely inaccessible. It is necessary to regard the spirit and object of the Legislature, as well as the mere words which it has used.

The “*judgments*” of the sheriff, granting or refusing registration, are, as long as they remain unaltered, *conclusive* of the rights of parties claiming or objecting; but any party considering himself aggrieved by that ‘judgment,’ may appeal, and apply for alteration of it:§ and whenever|| any party is dissatisfied with any ‘judgment’ of a sheriff, admitting or refusing registration, or expunging or refusing to expunge any name already in his register, at any of the annual registrations or cor-

* Stat. 2 & 3 Will. 4, c. 65, s. 18. † Ditto, s. 19. ‡ Ditto, s. 22.
 § Ditto, s. 23. || Ditto, s. 25.

rections, such party may appeal from such judgment, to the sheriffs forming the court of appeal, finally to determine the appeal: and “the judgments of these courts of review are in all cases final and conclusive, and liable to no process of review” * —and the sheriff must alter and correct his register in conformity with their judgments, wherever they have reversed or varied his own judgments. Finally, any person whose claim to be registered has been rejected by the sheriff, or court of review, may tender his vote at the election; and it is to be entered, distinguished from the votes of those on the register, so that it may be in the power of any election committee to give effect to the vote, in deciding upon the validity of any disputed election.†

It would appear clear, from this account of the Scottish electoral process, that the functions of the sheriff in dealing with claims, whether objected to or not objected to, are judicial: he ‘examines’ and ‘considers’ witnesses, documents, facts, and law; makes a note of the fact or law, as the ground of any appeal which may be had; and his granting, admitting, or refusing registration, or expunging or refusing to expunge names, is expressly designated a ‘*judgment*,’ conclusive of the rights of the parties claiming or objecting, unless reversed or varied by the ‘judgments’ of the court of appeal. When, therefore, the statute prescribing this process goes on to enact, in comprehensive and positive terms, that no part of that process “shall be held to *limit* or *restrain* the existing power of a committee to take into consideration the validity of *any* vote or claim for registration admitted or rejected by the *sheriff*, or the court of appeal’—it is not easy to see what judgment of either the sheriff or the court or *appeal* can be beyond the *unlimited* and *unrestrained* existing jurisdiction of the supreme tribunal. There is no clause in the act rendering it imperative on a rejected claimant to appeal, as a condition of afterwards being heard before a committee; nor is there any distinction drawn between the judgments of the sheriff, in opposed or unopposed claims. If this reasoning were to be followed out to its legitimate consequence, it might appear that in no case is any judgment of either the sheriff in the first instance, or the court of appeal in the second, a bar to a committee’s “taking into con-

* Stat. 2 & 3 Will. 4, c. 65, s. 25, post, p. 25, A.

† Id. s. 26.

sideration the validity” of any such judgment: for no name can be either admitted or rejected, except through the medium of a judicial decision in the first instance. Questions of this description have been recently set at rest in England and Ireland, by the two statutes already so frequently adverted to, requiring an *express* decision of the revising and assistant barristers, respectively leading to a *special* exercise of this judicial authority, as the condition of a committee’s subsequent interference. In such a case, the inherent jurisdiction of the committee has been taken away, *pro tanto*, by positive enactment; but the case seems far otherwise with reference to the Scottish statute: and the conflicting conclusions to which the few committees on Scottish elections have arrived, would seem to justify the interposition of the Legislature.* These questions have been stirred in three election petitions in respect of Scottish counties—that of *Linlithgow*, in the year 1833;† *Inverness*, in 1835,‡ and *Peebles*, in 1848.§

In the first of these cases, that of LINLITHGOWSHIRE, one *William Robb*, who had claimed as a “proprietor,” had been rejected by both the sheriff, and the Court of Review: but the committee, after elaborate argument, held that Robb was the tenant, not the proprietor; and that ‘it was their opinion that he was entitled, and ought to have been admitted to vote at the election;’ the chairman adding, that they should insert his name in the register as *tenant*.|| The same committee, in one *James Ritchie’s* case, held that they would not enter into it, because his claim having been “rejected” by the sheriff, the claimant had not appealed to the Court of Review. It was admitted by the counsel objecting to the committee’s entertaining the inquiry, that ‘it *was competent* for the committee to take into their consideration the validity of the vote, but that if they did, they would act in contravention of the *intention* of the legislature, which certainly proposed that a voter should go through both the courts below, before he applied to a committee.’ To this it was answered irresistibly, that if the legislature had so intended, it would have been easy to find words to say so, but

* The leading arguments founded on the inherent jurisdiction of the House, may be seen in the *Orford case*, P. & K. 74—93.

† P. & K. 280.

‡ K. & O. 299.

§ P. R. & D. 46.

|| P. & K. 281—290.

there were none such ; and the claimant might have had the best reasons for preferring the decision of a committee to that of the three sheriffs. The committee, nevertheless, resolved that the right to appeal was a bar to their going into the case.* It is impossible to support this decision, especially on the extraordinary ground stated by the chairman, ‘ that the committees were *aware of their powers*,’ i. e. that they had jurisdiction, ‘ but they thought this a question for their discretion.’ If they had jurisdiction, they were bound to exercise it ; † the subject had a right to it ; and the committee had no discretion in the matter. The intention of the legislature was to be gathered from the language it had thought fit either to use, or to abstain from using. If the intention of the legislature had been that alleged, *quod voluit, id non dixit*. In the same committee, the *Rev. Robert Kennie’s* name stood on the register ; and as he had not been objected to before the sheriff they refused to entertain the case.‡ In the *Rev. A. D. Tait’s* case, the sheriff had rejected the claim, though unobjected to, because he thought that a *prima facie* case had not been made out : but on his appeal to the Court of Review, they reversed the judgment of the sheriff, and put the name on the register. The committee determined that the case should not be gone into ! § On these decisions having been given, the petitioners abandoned their case.

In the second of these cases, that of *INVERNESSHIRE, James Finlay’s* || claim to be enrolled, was put in, dated the 14th August, 1832 ; and bore endorsements, showing that it had been registered by the sheriff in that year, and that it had been subsequently admitted by the Court of Appeal. The name remained unobjected to, on the register, during the years 1833 and 1834, on both which occasions Finlay had voted. The claim had been objected to before being registered by the sheriff, whose decision had been confirmed by the Court of Appeal. The question having been argued at great length, the committee held “ that the register should not be opened : ” the reporter adding, in a note, “ that he was enabled to state, from the best

* P. & K. 296, 297.

† *Boni judicis est ampliare jurisdictionem* ; and in the recent case of *Winck v. Winck*, H. Term, 1853, it was intimated by the Chief Justice of the Court of Common Pleas, that if a judge even *doubted* of his jurisdiction, he was bound to exercise it.

‡ P. & K. 299.

§ *Id.* 300.

|| K. & O. 305—314.

356 JURISDICTION OF THE SELECT COMMITTEE—

authority, that the ground on which the great majority of the committee came to their decision was, that the voter had not been objected to at the previous registration, and not because no appeal against the judgment of the Court of Review had been made to a committee by an election petition at either of the preceding contested elections.”* On the decision being announced, the petitioners abandoned their case.

In the last of these cases, that of PEEBLESHERE, it was attempted to be objected to before the committee, that one *William Scott* had only a fictitious or parchment qualification, such as it had been the object of stat. 2 & 3 Will. 4, c. 65, to destroy. No objection, however, had been made at any time before the sheriff, either when the name was originally inserted, nor during its continuance. The committee resolved, on these facts, that “the vote *not having been judicially decided upon by the sheriff*, it was not competent for them to enter on the question of his qualification to be on the register of voters:” and held further, that the resolution embraced the case of voters whose names *had* been objected to before the sheriff, but not at the registration of 1846—that in force at the time of the election then the subject of inquiry.

The only petition presented from Scotland for the General Election of 1852, is that from the Wigtown District of Burghs.† The election was carried by a majority of one vote; and the unsuccessful candidate petitioned on various grounds, some of which involve the questions discussed in the preceding pages: impeaching the rights of voters to have been placed, or continued, on the register; or to have voted at the election; and challenging the decisions of both the sheriff, at the revision, and of the sheriffs forming the Court of Appeal.‡

It will thus be seen, that the appellate jurisdiction of a Select Committee of the House of Commons, as interpreted by three Select Committees, stands on a different footing as to Scotland, from that in England and Ireland. In Scotland, the inferior appellate jurisdiction was created at the same time that the new system of registration was introduced, in 1832; but it was then also expressly enacted, as we have seen, that the judgments of that inferior appellate jurisdiction were not

* K. & O. p. 314, note (u).

† Petition No. 23.

‡ There also charges of bribery and treating.

to limit or restrain the power of the higher tribunal.—In Ireland, in the same year, it was enacted that where the adjudication of the assistant barrister was against the claimant, on the ground of insufficiency of value, he might appeal to the judges of assize, and have the question tried by a jury;* and where registry was refused on any other ground, the claimant might appeal to the judges of assize, who might review his decision, and affirm or reverse it, as they thought fit.† The certificate was made conclusive of the right of voting.‡ The decisions of committees on their right to inquire into the register, were extremely inconsistent and unsatisfactory. The English act gave no intermediate appellate tribunal; but simply enabled petitioners to impeach the correctness of the register by showing that in consequence of the decision of the revising barrister, the name of any voter had been improperly inserted or retained, or the name of any person tendering his vote had been improperly omitted, from the register. We have seen, however, that in 1843 the English, and in 1850 the Irish system, were placed upon a sounder and better defined footing, and now occupy the same position before a committee of the House of Commons. The decisions of the Exchequer Judges in Ireland, and of the Court of Common Pleas Judges in England, are final, conclusive, and binding on every committee; while those of the Sheriffs' Court of Review in Scotland are declared, on the contrary, not to limit or restrain the powers of such committee. Than these, words would seem incapable of speaking plainer; and the construction which has been given to them by committees would seem to place the Scottish franchise in the hands of the three sheriffs constituting the Court of Review, as a final and supreme tribunal!

Thus much for the *appellate* jurisdiction of a Select Committee of the House of Commons.

* Stat. 2 & 3 Will. 4, c. 88, s. 24.

† Id. s. 25.

‡ Id. s. 54.

CHAPTER XIX.

JURISDICTION OF THE SELECT COMMITTEE— THE ORIGINAL JURISDICTION RESUMED.



HAVING disposed, in the preceding chapter, of the appellate jurisdiction of a Select Committee of the House of Commons, its original jurisdiction is again the subject of consideration, and as nearly as may be, in the order in which those events occurred, in respect of which that original jurisdiction exists; which commences as the last chapter commenced, with necessarily the first matter presented to the Select Committee, the validity of the petition itself: the sole foundation of their jurisdiction, whether original or appellate.

It is necessary to recur to the leading feature of the existing Election Law, which consists in the registers being declared conclusive evidence in English and Irish cases, subject to two specified exceptions, as to the voter's *continuing to have the qualification* annexed to his name in the register,* and being final and conclusive, with certain specified exceptions, to all intents and purposes, as far as regards the proceedings before the Select Committee, as to the right to *vote*, of the person so on the register;† power, however, being reserved to the Select Committee to review an express decision of the revising barrister, which had led to a name's having been 'specially' inserted, retained, omitted, or expunged, in his revision of the register. These last cases were disposed of in the preceding chapter.

I. The finality of the register, however, is a question which cannot arise in a case which may easily occur, and has often occurred: where, for instance, the name of a person entitled to be inserted in the register, and who has complied with the require-

* Stat. 6 Vict. c. 18, s. 79, ante, p. 138; stat. 13 & 14 Vict. c. 69, s. 104, post, 139, A.

† Id. s. 98.

ments of the law for that purpose, nevertheless does not appear, nor ever did appear on the register, solely through accident, negligence, or fraud on the part of the functionaries entrusted with preparing the lists. Here is a *right*, which cannot be exercised, and that through no fault of its possessor: and *ubi jus ibi remedium*. In the language of Lord Holt, 'it is a vain thing to imagine a right without a remedy: for want of right, and want of remedy, are reciprocal,'* *Lex semper dabit remedium*: and without referring to the pecuniary compensation which the common or statute law has given to one injured by the negligence or fraud which may have occasioned the loss of the franchise, it suffices to say, that the particular case under consideration does not appear to have been provided for by the recent statutes, so far as to enable a Committee of the House of Commons to deal with it. This seems a *casus omissus*: with reference to which the rule is, that it must be dealt with according to the law as it existed prior to the statute evidencing inadvertence on the part of the legislature.† As, therefore, the person in question could have exercised his franchise before these statutes had passed, so he is able to do so now, but necessarily in accordance with the new mode of *exercising* the franchise. If, he tender his vote at the election, the returning officer must needs reject it, since he has nothing to look to but the register; and the statute 6 Vict. c. 18, gives him no authority to enter the vote as a tendered one, as he may do in two other specified cases. On proof of the facts, however,—of his right to have been placed on the register; that he had been guilty of no laches, and that his name would have appeared on the register but for the default of the proper officer; and that he tendered his vote at the election; a Select Committee will add his name to the poll, in favour of the candidate for whom he had desired to exercise his franchise. This is by virtue of the original common law authority of the House of Commons, of which no statute has expressly or even impliedly deprived it;—in addition to which it will be borne in mind, that all laws, statutes and *usages* in force in the United Kingdom before the year 1832 remain in full force, except where therein

* *Ashby v. White*, 2 Lord Raym. 953.

† *Casus omissus, et oblivioni datus, dispositioni communis juris relinquitur*.—*Bishop's case*, 5 Co. Rep. 35.

repealed or altered, or inconsistent with the provisions of that Act.* These principles will be found to have been acted upon by the *Southampton* Committee [P. & K. 226] in *Dawson's* case, which occurred in the year 1833, very shortly after the passing of statute 2 & 3 Will. 4, c. 45. The claimant's name had duly appeared in the list affixed by the overseers on the church door, and no notice of objection to it had been delivered; but it had been accidentally omitted from the list produced to the revising barrister, who signed it without the name having been inserted in it, or having been alluded to before him. The excluded person tendered his vote at the election, but it was rejected, and no entry made of the tender. On proof of these facts, and after full argument, the committee properly placed Dawson's name on the poll, as having 'had a right to vote at the election.' In conformity with these principles have been decided several other cases:—*Gaunt's* case, *Droitwich* [K. & O. 57—A.D. 1835], *George's* case, *New Windsor* [ib. 163], *Seller's* case, *Lyme Regis* [B. & Aust. 499—A.D. 1842]. *Dawson's* case was very elaborately argued; and does not come precisely within the line which surrounds the others, inasmuch as the barrister had, in fact, expunged the name on an objection at the time of revision,—but through a misdescription† in the printed list, owing to a mistake of the printer.

II. The provision of statute 6 Vict. c. 18, s. 79, making the English register '*conclusive* evidence that the persons therein named CONTINUE to have the qualifications respectively annexed therein to their names, thereby effecting a great alteration in statute 2 Will. 4, c. 45, and abolishing the third question permitted by sect. 58 to be put at the time of election, as to the continuance of the qualification, is applicable to both county and borough voters, but subject to one very important proviso in the case of *county* voters, and to another in respect of borough voters.

First, as to county voters in England. To appreciate the distinction drawn between county and borough voters, with respect to the continuance of their qualifications, a little preliminary explanation is necessary.

* Post, p. 1, A.

† This case was decided, it will be observed, several years before the passing of stat. 6 Vict. c. 18, s. 101, containing such salutary provisions to meet the cases of such 'inaccurate description' as that which gave rise to the decision in the text; ante, p. 136.

There is obviously a much less facility for detecting the loss of a county qualification, or of at least several species of it, than in the case of a borough qualification, as will appear on comparing the different modes of making out the lists in counties and in boroughs,* and considering the nature of the respective franchises, and the ease with which property qualifications may be parted with in counties, unknown to any one except the parties concerned, and unsuspected by any one who, if he knew it, might choose to scrutinize the register, and object to a name continuing on it in respect of a qualification since lost. In counties, the register is framed by re-printing the preceding year's register, adding to it the names of new claimants; and it is hence obvious that a voter's name may be successively transferred from register to register, as still possessing a qualification in respect of property which he may have parted with ten years before.† When, therefore, it was seen that the bill, which afterwards became statute 6 Vict. c. 18, made the register '*conclusive*' evidence of a '*continuing*' qualification, and that no question could be asked, at the time of election, as to the fact, a proviso was prudently added, in the House of Lords, to sect. 79,‡ to meet the case:—declaring substantially that where a qualification appears annexed to a man's name on the '*preceding register*,' but on the last day of July in the year in which

* Ante, pp. 128, 134.

† The exact case came under the author's notice during the general election of 1852.

‡ Mr. Rogers has thus illustrated the practical operation of this proviso:—In July, 1842, A. and B. claimed to be registered: whereupon their names appeared in the register in November of that year. A. parts with his qualification before, and B. with his, after the 31st July, 1843; the present act now [i. e. 6th June, 1844] saves the votes of both so long as the register of November, 1842, continues in force, that is, till November, 1843. In July, 1843, the names of A. and B. appear upon the copy of the register sent by the clerk of the peace to the overseers; and no objection being made by the overseers, or other persons, both names are continued in the register of November, 1843. A. having parted with his qualification before the 31st of July, has no right to be on that register; and, if objected to, his name might have been expunged at the revision; nor is his vote saved by the above mentioned act; and if the vote were given after November, 1843, would be struck off by a committee. B. having retained his qualification till after the 31st of July, could not have been successfully objected to; and his name must have been retained on the register, but, under the Reform Act, without the power of voting; the present act reserves the power during the continuance of such register, that is, till November, 1844.—Practice of Election Committees, p. 205, note (a).

such register was in force he had ceased to have either the whole qualification, or a portion of it sufficient to have entitled him to be registered, ‘*it shall not be lawful* for any [such] person to vote.’ The statute does not proceed to say, in terms, that the name of the person who votes, in disregard of this prohibition, may be struck off the poll, by the committee, nor that he shall be subject to any liability for voting: but it is clear, on legal principles, that the Select Committee has by this statute legal authority to strike from the poll the name of a person so contravening the act; and also that such a person is liable to an indictment, at common law, for a misdemeanor: inasmuch as, when the statute prohibits an act, or requires an act to be done, disobedience of the statute is in either case a common law misdemeanor, though the statute annexes, in terms, no penal consequences to a disregard or breach of it.

The question as to the continuance of the qualification, in Ireland, depends upon language in the recent statute different from that used in the corresponding section in stat. 6 Vict. c. 18, discussed in the foregoing paragraph. By sect. 85 of the Irish stat. (13 & 14 Vict. c. 69) the register is simply constituted ‘conclusive’ evidence, alike in county and borough voters, of the continuance of the qualification specified in the register in force at the election; without any such proviso as is contained in the 79th section of the English Act. In the 89th section of the Irish Act, again, the voter is relieved from taking any oath of, *inter alia*, “his *qualification continuing*”—words not to be found in the corresponding (82nd) section of the English Act: while the 98th section of the latter, and the 104th section of the former act, are identical as to the ‘register’ being final and conclusive to all intents and purposes, before a Select Committee, as to the right to vote. The distinction here pointed out, whether intentional or unintentional on the part of the legislature, is very important; and the Irish voter, in both counties and boroughs, may exercise his franchise at the election which occurs during the continuance in force of the register in which his qualification appears, notwithstanding he may have lost or parted with his qualification the day after the register was completed; till which day, only, he may have retained it solely to acquire the franchise for the ensuing year without any qualification. It may be, on the other hand, that the legislature contemplated putting an

end to landlords evicting their tenants from political considerations.

Secondly, as to borough voters in England. The same section (79) which imposes this *veto* upon the improper use of the *county* franchise, after the qualification out of which it had sprung has ceased to exist, also exacts of *borough* voters that they shall, ever since the 31st July in the current electoral year, have **RESIDED**, down to, and at, the time of voting, within the city or borough, or place sharing in the election for either, or within *seven* miles of it, in respect of which is claimed the right of voting.

What constitutes such a "residence," may be seen in a previous part of this work.*

If, therefore a borough voter have ceased to reside, as required by the act, from the 31st July, down to the time of voting, he is "not entitled to vote" for the city or borough in respect of which he claims to exercise the franchise; and if he have nevertheless wrongfully exercised that right, a Select Committee has authority, impliedly, to nullify the wrongful act by expunging the name from the poll.

It will have been seen† that the condition of residence is not imposed upon county voters. In the case, then, of borough voters, provided they reside within the requisite distance, and for the requisite time, they will be entitled to vote, although they may have lost the whole of the qualification in respect of which their names were placed upon the register; which is *conclusive* evidence that they *continue*, during the time of that register being in force, to have the qualification which they may have notoriously lost.

III. There is yet another case in which a Select Committee has authority, in the statutory exercise of its original jurisdiction, to nullify a vote given by a voter, whose right to do so had been evidenced by the register: namely, in *every case of statutory or common law* INCAPACITY‡ which had "ARISEN" subsequently to the lists leaving the hands of the revising barrister. This authority depends upon a proper construction of

* Ante, p. 102, 103.

† Ante, p. 92.

‡ As to the different kinds of 'incapacity,' and the principles on which they depend, vide ante, chapter vii. pp. 139—172.

so much of stat. 6 Vict. c. 18, s. 98, as is applicable to the matter in question: and the peculiar wording of this part of the section is not destitute of difficulty.

The revising barrister has ample power to deal with every case of statutory or common law incapacity duly brought under his notice, in the case of one whose name stands on, or who is desirous that his name should be inserted, or retained in, the register. If it be brought ‘specially’ under his notice, and become the subject of express decision, the propriety of it may be examined by a Select Committee:—if, though then existing, it be not so specially brought under his notice, a Select Committee can clearly have no cognizance of it. There can be no distinction between incapacity, and any other cause for impeaching a person’s right to be placed on the register by the revising barrister: the only question is, as to his having ‘specially’ and by an ‘express decision’ dealt with the case before him. If, therefore, by any oversight, as was suggested by the present Mr. Justice Maule in arguing *Hall’s* case [*Monmouth*, K. & O. 415—A.D. 1835], and the late Mr. Rogers, in *De Barthe’s* case [*Reading*, F. & F. 554—A.D. 1838], the name* of a woman got on the register, and was left there by the revising barrister,—what lawful authority could the returning officer have to reject her vote, absurd as the idea may be, if she tendered herself in the polling booth, and answered the only two questions which he could ask her? And by what authority could a Select Committee afterwards strike off the name of a voter whose name had not, though it could have been objected to, before the revising barrister? The same reasoning applies to this as to any other case of ‘legal incapacity’—as to infancy, alienage, idiotcy: and in conformity with these principles, several committees have refused to inquire into cases of alleged *infancy*, alienage, and other incapacities, where the objection had not been raised before the revising barrister:† all of these being cases decided previously to the year [1843] in which was passed the statute now under consideration. It appears then to be clear, that if an incapacity existing but not objected to, at the time of registration, continue down to “the

* A female may have a Christian name affording no indication of her being such.

† *Infancy*, *New Windsor* [K. & O. 160, A. D. 1835]; *Monmouth* [Id. 415, A. D. 1835]; *Alien*, *Bedford* [F. & F. 437, A. D. 1838].

time of voting," a Select Committee cannot remove the name from the poll, though the individual may, in certain cases, have exposed himself to heavy penalties for voting. The stat. 6 Vict. c. 18, s. 98, however, established a clear distinction, by the few words "which had *arisen* subsequently." There do not seem to have been, since that year, any decisions of committees at variance with the principles here laid down. If, *at the time of voting*, the claimant to vote be under any statutory or common law "incapacity," *which had "arisen subsequently"* to the time of registration, though the revising barrister could, of course, have had no grounds for excluding the name from the register, a Select Committee can entertain that objection. The words "which may have *arisen subsequently* to the time allowed for making out the lists," appear clearly to embrace both the statutory and "other legal incapacity" which may either of them have come into existence, since the moment when the register quitted the hand of the revising barrister. If, in either case, the objection were in existence so as to have been taken before him, the "incapacity" at which it might have been aimed, though continuing down to the time of voting, is beyond the province of the Select Committee. If, however, a statutory or common law incapacity 'arose,' as either might, subsequently to the completion of the register, but had ceased before 'the time of voting,' then the subject of that temporary incapacity would be entitled to vote:—for at that moment no "incapacity" existed—the cloud which had flitted over the voter's position on the registry, having vanished. The portion of the 98th section applicable to this subject, is levelled expressly at one point—viz. "*the time of voting*:" and the words "which may have arisen subsequently" appear to over-ride both the previous clauses—viz. the incapacity by virtue of a "statute," and any 'other legal'—i. e. common law incapacity. There seems no reason whatever why the statutable incapacity need *not*, nor why any *other* than a statutable incapacity *need*, to have arisen subsequently to the completion of the register: unless, indeed, a *statutable* incapacity,—as in the case of a conviction for bribery, "for ever disabling to vote"*—be held of so solemn and transcendent a nature, as the deliberate *fiat* of the legislature itself, that it shall always be recognized under all circumstances by

* Ante, p. 162.

any tribunal, whether of parliament or elsewhere, without reference to such considerations, as its having been omitted to take advantage of the fact before the revising barrister. If, however, the former of these two constructions of section 98 be the correct one, it follows, that whatever be the nature of the legal incapacity, if it ‘*arose*’ between the day of completing the register and the day of the election, and continued in existence on that day, the Select Committee has jurisdiction to deal with it; otherwise not, unless it had been the subject of express decision by the revising barrister. Supposing, therefore, a person on the register, after the completion of it, should accept any disqualifying office or employment under government, for instance, or become a peer of the realm,* or a lunatic, or felon convict, or be *convicted* in a court of law of bribery, or should have received parochial relief or other alms *disqualifying* from voting—on due proof of such facts, his name will be struck off the poll by the Select Committee. Thus in *Whiteside’s* case, Lancaster (2nd), A.D. 1848,† parochial relief received by a voter three days *after* the teste of the writ, i. e. previously to the time of tendering his vote, was properly held to disqualify him, and the committee struck off his vote. Previously to the passing of the Reform Act, the established custom of parliament disqualified the recipients of parish relief at any time within one year before the election;‡ and between the passing of that statute and stat. 6 Vict. c. 18, several committees decided that the receipt of alms, after registration, but before the day of election, disqualified.§ This head of incapacity has been fully considered in the seventh chapter of this work.|| Finally, as every act of receiving parish relief operates as an express and independent legal incapacitation,¶ it seems clear that it is one which “*arose*” within the meaning of that word in the 98th section of stat. 6

* In the election for the University of Oxford, in January, 1853, two peers of the realm, who were members of Convocation, appear to have voted, one under formal protest. On a scrutiny, it would seem that these votes would be struck off the poll. The Sessional Order is peremptory. Vide post, 453, A.

† Power, Rodwell & Dew’s Election Cases, 160.

‡ 2 Dougl. 126, note.

§ Ante, p. 153. In *Harrison’s* case, Lancaster (2nd), P., R. & D. 164, it was properly decided, in conformity with stat. 4 & 5 Will. 4, c. 76, s. 56, that the receipt of parochial relief by an *unemancipated* child of the voter, above the age of *sixteen* years, did not disqualify.

|| Ante, pp. 151, 156.

¶ Rogers on Election Committees, 204.

Vict. c. 18, provided the receipt occurred between the day of completing the register, and the time of tendering the vote.

The receipt of parochial relief, in Scotland, within twelve months previous to the 31st July in each year, is a statutory disqualification * for ‘being registered, *or voting*,’ in boroughs. It is not quite clear, however, what would be the effect of a Scottish voter’s receiving parochial relief between that day, and the day of election.

In Ireland, it is conceived that a voter’s receipt of parochial relief between the two intervals in question would fall under the rule applicable to England; inasmuch as the language of stat. 13 & 14 Vict. c. 69, s. 104, is in this respect identical with sect. 98 of the English Act.

Pursuing the chronological order of the causes calling forth the exercise of a Select Committee’s jurisdiction, the inquiry has now arrived at the period of the election itself, and its immediate preliminary stage. When, however, it is borne in mind that the matters with which the preceding and present chapters are occupied, form the subject of *Scrutiny*, it appears convenient to continue the course already commenced, by proceeding to the remaining grounds of impeaching *individual* votes, or classes of votes, in respect of occurrences, during the election, affecting the voters *personally*.

IV. If one whose right to vote is conclusively evidenced, at the election, by the register, have been nevertheless fraudulently forestalled, in the exercise of that right, by one who has *personated* † him, he is entitled to tender his vote, duly complying with the statutory requisites; and *this* tender the returning

* Ante, p. 40.

† In *London’s case*, *Taunton*, Falc. & Fitz. 295 [A. D. 1838], the individual who was alleged to have personated a voter, proved to have himself a right to be on the register. His christian name was Daniel, and the christian name in respect of which he had voted, was *Thomas*. The witness declared that on the poll-clerk mentioning the name “Thomas,” the witness had said ‘My name is Daniel—it is a mistake.’ Thomas London named in the register did not vote; and there was such a person, a relative of Daniel. Mr. Austin submitted that “the evidence of personation was too clear to admit of doubt;” but the committee presumed, in the absence of decisive evidence to the contrary, that a mistake had been made in the christian name in the register, and that the person who had a right to vote was *Daniel*. He had been himself a voter for many years.—Perhaps, in so doubtful a case, it was safer to lean in favour of the franchise, as exercised.

368 JURISDICTION OF THE COMMITTEE—SCRUTINY.

officer is bound to record, as a tendered vote. On proof of these facts, the Select Committee must enter his name on the poll; and this by virtue of their *statutory* original jurisdiction:* but it may be observed, that stat. 6 Vict. c. 18, does not *expressly* enable the committee to deal with a vote tendered under these circumstances, as it does (sect. 98) in the case of a vote which can be received only as a tendered vote, in consequence of the express decision of a revising barrister excluding it from the register.

V. Hither, also, may be referred the cases of individual voters, or classes of voters, who can be proved to have been prevented from voting for a particular candidate, by violence, or intimidation. It is apprehended that if a voter be forcibly detained from the poll till after it is closed, or dealt with in such a manner as to amount to abduction—that is, taken away to some other place, and violently, or by other means prevented from going to the poll, for which reasons only he did not do so, his name ought to be added to the poll. There seems no distinction in principle between such a case as this, and that of any other wrongfully excluded vote. In the *Dublin Election* case, March, 1827, on evidence having been proposed to be offered to show gross intimidation by Roman Catholic priests, the chairman interposed to ask “whether the influence alleged to have been exerted, was of such a character as, if established, would avoid the election, or *the particular votes only* which were supposed to have been influenced?” The counsel for the petitioners admitted that “the charge could not be substantiated to so great an extent as to avoid the election:”—and ultimately the chairman intimated “that the committee did not think it competent to them to receive evidence which it had been acknowledged could not affect the seats of the sitting members, or *the votes of individuals*.” They deferred, however, their *decision*: but subsequently stated that, for the reasons assigned, “they did not consider that that part of the case should be proceeded with.” The petition had prayed that the sitting members, or one of them, might be declared not duly elected, and that the petitioner was duly elected, and ought to have been returned.†

* Stat. 6 Vict. c. 18, s. 91, post, p. 308, A.

† Report of the Case of the County of Dublin Election, by James Espinasse, Esq., pp. 55, 59 [A. D. 1827].

In his report of the *Dumfermling* case [1803], Mr. Peckwell states that one of the “many questions of law and fact on none of which the committee came to any separate determination,” was the following : “In what circumstances the vote of a person detained from the place of polling by the violence or contrivance of a candidate, should be added by the committee. See the case of *Inverkeithing*, Wight, 343 ; Sir J. Mackenzie’s Observations, p. 468 ; Spottiswoode’s Treatise on Elections.”* In referring to the first of these works,† which relates chiefly to the former parliamentary law of Scotland, the passage referred to will be found as follows : “The effect of force by one party, even though upon only *one* of the other party, has been pleaded to the effect of *annulling an election*, notwithstanding that the vote of the person detained by such force from attending the meeting would not have been sufficient to cast the balance : on the ground that it is not a person’s vote only, but also his vote and influence, and the effect his reasoning may have with others, that ought to be taken into the scale : that objections might be known to him, of which every other person was ignorant ; and that the terror diffused by the exercise of force, though applied to only one, might operate strongly upon others, and check the freedom of their voices.” The author however immediately intimates that “this reasoning is perhaps too refined—the force ought to operate so far as to disqualify all those who were in any degree accessory to it ; but one may doubt the propriety of carrying it further.” In the second of the works referred to, and quoted in the first, Sir J. Mackenzie mentions a determination of the Parliament of Scotland, finding, “that a person was capable to vote, albeit he was detained prisoner by a misinformation from one of the competitors ; he having given an account of the way and manner of his imprisonment, to the meeting, and declared his vote to them, and after his enlargement, did immediately take the test and sign the commission.” If it were to be held that an individual elector’s vote could be effectually got rid of by means of abduction, especially in a close contest, and that such vote could not be afterwards added to the poll on a scrutiny, it would be simply offering a premium on systematic abduction ;

* 1 Peckwell, 5.

† Enquiry into the Rise and Progress of Parliament, chiefly in Scotland, &c., by Alexander Wight, Esq., Advocate, p. 344, 1784.

and a committee would have little difficulty in inferring from the facts likely to be proved in such cases, that the act had been done by the candidate, whose interests it would have served,—by ‘his agents and others on his behalf.’ This charge in respect of a single voter was *one* of the allegations in the *Montgomery* case [P. & K. 162—A.D. 1833]. The petition contained other general charges of abduction, treating, intimidation and bribery; its only prayer was that the election might be declared void; the committee decided that it was. The effect of a general, or, as it may be termed, systematic abduction, upon the whole election, will be considered hereafter.

VI. The committee will also strike from the poll the name of any voter who shall be proved to have been *employed*, in any *capacity*, within six calendar months before, or during, or within fourteen days after the completion of the election, at such election, for the purposes of it, and shall, for, in consideration of, or with reference to such election, at any time before, during, or after the election, *accept or take* from the candidate or candidates, or from any person whatsoever, for, in consideration of, or with reference to such employment, any sum or sums of money, retaining fee, office, place, or employment, or any promise or security for any such.* It is difficult to conceive words more extensive in their application than these: and it is to be noted that it will not signify *by whom* the voter ‘was employed;’ nor from whom the reward, promise, or security for it, is to come. The recited object of the act is, ‘to make further regulations for preventing *corrupt practices* at elections,’ *and* for diminishing the expense at them.

The true clue to the construction of this salutary and effective enactment, is that pointed out by the late Sir Robert Peel, as Chairman of the *Evesham* Committee,† viz. that ‘there is a broad distinction between persons [in that case messengers], specially employed for the purposes of the election, and those classes of persons [post-boys or coachmen] who were employed merely in *their usual avocations*.’ The enactment is levelled, not against the doing work for the purpose of the election, but being employed in “*some capacity* for the purpose of the election.” Were the mere doing work for the purpose of the election—to

* Stat. 7 & 8 Geo. 4, c. 37, s. 1, post, p. 218, A.

† F. & F. 530.

be paid for, moreover, “by any person”—to occasion an incapacity to vote, it would be hard to say where the disfranchisement would end. The printer of a hand-bill, the stationer preparing the poll-books, the carpenter erecting the hustings, &c. &c. &c., would all be disfranchised.* This principle will be found applied, in an earlier portion of this work,† to the case of an army clothier contracting with a colonel to supply regimentals—the former having been held to be not disqualified for being elected, as a contractor *with Government*: “if he were,” said the Court, in the case there cited, “the tailor, the draper, the button-maker, and lace-maker under him, would each be disqualified—for everything thus furnished has an application to the service of the public.’” It is nevertheless manifest, that cases of this description require to be watched with extreme jealousy, if it be desirable to carry out the main object of the statute—‘preventing *corrupt practices*’ at elections. It has been well observed, that the main object of the statute was to put an end to the creation of ‘*employments*’ or ‘*capacities*’ for the purpose of the election, in order to gain which, and the pay or hire attached to them, a voter might be induced to barter his vote—independently of the opportunities thereby afforded for *colourable* employment, and *corrupt* payments. A secondary object may have been to secure the performance of official duties by non-voters, not so likely as voters, to be warped and excited by party feeling.‡ The Evesham Committee, of which Sir Robert Peel was chairman, struck off§ the votes of two persons who had been employed at the election as ‘messengers,’—though that was their ‘ordinary calling.’ Though a man may get his livelihood by going on errands, he must not complain if he lose his franchise by accepting paid employment for the purpose of the election.|| It must be owned, however, that this case admits of much argument. The statute specifies

* Rogers on Elections, 92.

† Ante, p. 184, *Thompson v. Pearce*.

‡ Rogers on Elections, 96.

§ There were two sitting members petitioned against, as to one of whom, a case of personal bribery, had been established by the resolution of the committee. The committee struck the disallowed vote from the poll of both sitting members, as if it had been given for both.—F. & F. 5, 525. The sitting member was allowed to carry on the scrutiny after he had been disqualified for personal bribery, and placed in a minority.—See the resolution of the committee, id. p. 529, 531.

|| *Evesham*, F. & F. 524, 527 [A. D. 1838].

372 JURISDICTION OF THE COMMITTEE—SCRUTINY.

“*counsel, agent, attorney, poll-clerk, flagman,*” adding. “or in any other capacity.” Within these latter words it has been held, that *check-clerks* employed and paid by a candidate, are disqualified from voting for either him, or for another candidate at the same election, who had neither employed nor paid him.* Another committee would not allow the paid agent of one candidate to vote for another candidate:† while the Gloucester Committee‡ similarly dealt with a parish clerk employed and paid by both parties to point out the houses of the electors. The regular bell ringers of Evesham had been employed during the canvass, and the days of election, to ring the bells: and the committee, after great consideration, and evincing an evident anxiety to take an apparently *bonâ fide* case out of the operation of the rule which they had laid down in the case of *messengers*,§ allowed the votes to remain: but the two decisions are not easily reconcilable in principle.||

Those who are employed in elections in respect of their public official capacities, independently of and collateral to the election,—and especially where the office held by such persons is compulsory, do not fall within the meaning of the statute. These duties and services have reference to their *original* office or employment, and not to any ‘capacity’ in which they are employed ‘for the purpose of the election.’ It is contrary to principle to disfranchise a man for the discharge of duties which he is *compelled* to discharge. On this principle returning officers, sheriffs, and under-sheriffs,¶ are not incapacitated from voting. The situations specified in the statute—‘counsel, agent,

* *Bedford Town*, P. & K. 136 [A. D. 1833].

† *New Windsor*, K. & O. 174 [A. D. 1835].

‡ K. & O. 246; ante, p. 150.

§ Ante, p. 371.

|| In the *Leicester and Cheltenham* cases [A. D. 1848], many voters are reported to the House as having been bribed “under the pretence of remuneration for services as messengers and runners.”—P. R. & D. 177, 189. It were, indeed, easy to conceive barefaced and wholesale bribery perpetrated under such contrivances: as, for instance, by employing the brothers and sons, or other relatives of voters, as well as voters themselves, and in large numbers, to act as watchers, nominally to prevent bribery, kidnapping, &c., and paying them for their services, or with any arrangement or understanding for remuneration, prospectively or retrospectively, almost an entire constituency might be corrupted. N. B. In the *Second Ipswich*, Barr. & Aust. 609, the bribery was effected by paying 30s. to the voter for pretended services by his son as a messenger.

¶ K. & O. 185.

attorney, poll-clerk, or flag-man,' are all *voluntary*: and the selection of them indicates, of itself, the intention of the legislature. The case of a *deputy* sheriff has given rise to varying decisions; but it seems to be certainly a *voluntary* employment, equally with any of those specified in the statute,—a poll-clerk, for instance, and ought therefore to be held to incapacitate. The case of a town-clerk, also, who demands a fee, *as town-clerk*, over and above the demand for the hustings expenses, has been differently dealt with; the *New Windsor** Committee decided against the vote; but the *Harwich* (1st) Committee, on this case being cited, disregarded it, and upheld the vote.†

It remains to be stated, that to bring a case within the statute, which uses the words 'ACCEPT *or* TAKE any sum or sums of money, retaining fee, office, place, or employment, or any *promise or security* for any such;' the acceptance, and taking, the promise and the security, must be proved to have been "for, or in consideration of, or with reference to, *such employment*." In the *New Windsor* case, which was an extended and severe Scrutiny, the chairman, Sir James Graham, "expressed his opinion that there must be either an *express* or IMPLIED promise of payment, connected with the employment, for the purposes of the election, ". either a specific promise to the voter, or else such an implied promise *as an action at law could lie upon*—as in the case of a solicitor." The same committee held that a solicitor's *acceptance* of, and acting under a retainer at an election, invalidated his vote, though no payment under it was proved. This was the case of William Long, an attorney; on whom the candidate's principal agent had called before the election, saying that he did so by the candidate's direction, 'to say he hoped they should have his services in the same manner as before.' This offer the voter accepted, and at once began to canvass in the ordinary mode of paid agents; but there was no evidence of his having been paid any thing for his services—as it had been left to the candidate to settle with him. For the vote, it was contended that the statute being in restraint of the franchise, should be strictly construed; and that there was no evidence of a retaining *fee* having been received: against the vote, it was urged that no *actual* payment

* K. & O. 185 [A. D. 1835].

† *Chapman's case*, P. R. & D. 307 [A. D. 1851].

374 JURISDICTION OF THE COMMITTEE—SCRUTINY.

or promise of payment was necessary ; that the presumption of law is, from engaging a man in his ordinary calling, that one impliedly promises to pay him for his services ; and that an action would have lain for the voter against the candidate, to receive payment for his canvassing services : it being properly alleged by counsel, that at least half the actions brought, are on such implied promises. The committee adopted this reasoning and expunged the vote.*

Another committee † refused to remove a vote from the poll, on proof only that the voter had acted as an inspector in the polling booth—there being “no evidence leading the committee to the conclusion that he had received payment, or promise of payment, for such employment.” The Court of Queen’s Bench, when presided over by Lord Tenterden, laid down the following as the rule of law, now implicitly adopted, on this subject : “The general rule is, that any man who bestows his labour for another, has a right of action to recover a compensation for that labour.” ‡ *Prima facie*, therefore, the voter in this case was entitled to be paid for his services—and it required evidence to rebut that presumption : such, for instance, as the services rendered being entirely out of the profession or business of the person in question ; or that he rendered them gratuitously. In the foregoing case, it admits of doubt whether there was *not* evidence on which the committee might have acted. In the immediately preceding case, however (*Newell’s case*), they acted differently with an attorney, who had been an inspector, and had previously declared “that he expected to be paid, and would not act unless it was agreed that he should be paid for his services.”

VII. The next class of cases in which the committee will strike a voter off the poll, is, where it is proved that a vote has been given under a corrupt influence, by means of bribery, whether or not through the sitting member or his agent. In either of the two latter cases, indeed, the seat is lost, though there be but a single act of bribery established. It is obvious, however, that an innocent candidate ought not to have the benefit of a vote which the law declares to be really no vote : nor, on

* *Long’s case, New Windsor, K. & O. 175.*

† *Power’s case, Dublin, F. & F. 200 [A. D. 1836].*

‡ *Poucher v. Norman, 3 B. & C. 744.*

the other hand, ought *his seat* be at the mercy of a guilty third person; who, from either friendly or malevolent motives towards the candidate, may corrupt an elector to vote for him. Where bribery is proved before a committee, the vote so purchased by it is void by the common law of Parliament. The person who gave his vote under such corrupt influence, is to be considered as if he had not voted at all.* The two facts to be determined by the committee are—whether corrupt influence had been used; and whether the vote was given under that corrupt influence. A vote, it has been well observed, must surely be good or bad, according to the intent or purpose with which it is given by the voter.† It is the existence, and the action, of the corrupt influence with which, in every individual case, the committee has to deal; and if the concurrence of the two be not made out clearly to their satisfaction, they are not to act with such levity as to disfranchise a man upon mere surmise. Every fair presumption, on the other hand, is to be made in favour of a vote, and must be rebutted by that *evidence*, “according to” which, alone, they are sworn to decide. The poll ought to be purged from every vote polluting it; but hastily so to stigmatize a vote, on a mere *moral* conviction, is not consistent with sworn judicial obligation.

In the *Kinsale* case,‡ *John Farley* was objected to as one of various “voters who had voted under corrupt influences”—and after a long examination, the vote was struck from the poll. Farley, a very poor man, had often been seen drinking, with other voters, at the public house where was held the sitting member’s committee, and where they had what they pleased, without paying for it: and the voter once said to his companions, ‘Drink—Mr. Guinness’ (the sitting member) ‘will pay for all;’ at another time, that his pawned clothes had been released; that he had stayed at the public house for some days previously to the election; had been promised 200*l.*, and the berth of a lighthouse keeper, as soon as the petition was over; and a letter was found on him, dated the 28th Oct. 1847 (the election having been on the 6th August), and which he said he had had from the sitting member: and was addressed by him to the voter, recognizing his ‘claims,’ and promising to do ‘everything to get him “*the situation he wished*”—“for he

* Orme on Elections, p. 298.

† Rogers on Elections, p. 252, note (a).

‡ Printed Minutes, pp. 199—210; P. R. & D. 21 [A. D. 1848].

was an honest, firm, and steadfast friend." The committee, after deliberation, by a vote of three against two, struck off the vote; and ultimately declared the seat void through bribery, but that there was no evidence that the acts of bribery were committed with the knowledge and consent of the sitting member.

This seems to have been a mixed case of treating and bribery; and illustrates the view which modern committees take of the true character of such inquiry,—viz. the corrupt influence under which the voter acted, in voting. It need hardly be added, that if an individual vote be proved to have been obtained by treating, it will be struck off the poll, as having been given under a corrupt influence, and this, it is submitted, alike whether the treating had been perpetrated by the sitting member, his agent, or a stranger. If the matter were not so, it would follow that the majority of a constituency, especially if small, might be corrupted by indubitable individual acts of treating, which could not be traced to the sitting member or his agent, and yet the former would sit in parliament by virtue, it might be solely, of corrupted votes. Whether from a friendly or a hostile motive, a real stranger to the candidate may so influence a particular vote by treating, as to cause it to be regarded in point of law and fact, as bribery. Two committees, indeed, have held that if *treating* influence a particular vote, it is *bribery* within stat. 4 & 5 Vict. c. 57.* A person may be as effectually bribed by 'meat, drink, or entertainment,' as by money or place, or the promise of, or a security for it. The 'contract' is in either case 'corrupt.'†

Some recent committees, however, in opposition to well-considered earlier decisions, have gone a great deal further than dealing with the case of the voter who is thus influenced, and have also struck off the name of the person who bribed an elector. How far, however, this course can be supported on principle, and whether it be really in accordance with the common law of parliament, is a grave question. The vote of the person bribing, may be given purely and conscientiously, and to a candidate knowing nothing of bribery, who has

* *Cambridge*, Barr. & Arnold, 179 [A. D. 1843], and *Wigan* cases, Barr. & Arnold, 792 [A. D. 1843], and Rogers on Comm. 209, note (b).

† Pickering's Remarks on Treating, &c., p. 12. In the *Second Cricklade* case, 4 Dougl. 55 [A. D. 1775], the committee held that "bribery" was comprehended under the words "corrupt practices alleged in the petition."

thereby acquired, on constitutional grounds, a right to retain the vote so purely and conscientiously given and received. The vote, too, may have been recorded before its giver had entertained a notion of corrupting another voter. Why, in that case, is the innocent candidate to be deprived of a legitimate vote? And even if his vote be in fact recorded after he, carried away by the eagerness of political feeling, has corrupted another voter, how does it follow that the vote of the briber himself is given under a corrupt influence? It may have been given, demonstrably, from the purest motives, in performance of long recorded promises; in unison with well known political principles; and by one whose station, character, and circumstances of themselves repel all presumption of corrupt influence over his own exercise of the franchise. By what right, then, in the absence of any statutory authority, can a committee take upon itself to *punish* such a voter, for that is the real character of the committee's proceeding, for a collateral wrongful act, by mulcting him of his franchise? Might they not with equal reason do so as a punishment for an assault, or intimidation, or any other wrongful act committed by him during, and in furtherance of, the election? And is such a course just towards an innocent sitting member? * It would appear sanctioned by neither justice nor parliamentary law, and a departure from the principles distinctly recognized and acted upon by the older committees. These topics, however, will be further considered, where the important subject of Bribery is brought fully, in a separate chapter, before the reader. It is here little more than alluded to, together with the cognate subject of Treating, and only so far as regards the effect of each upon individual votes, in a scrutiny.†

VIII. A committee will rectify *bond fide* mistakes made by the poll clerks in recording votes, as well as in refusing, from whatever reason, to enter votes properly tendered. This

* In *Dutton's case*, *Worcester*, K. & O. 254 [A. D. 1835], a voter was objected to, he having betted, on the day of election, on the result of it, 'which gave him a corrupt interest in giving his vote.' The committee declared his vote bad, and assigned the following astonishing "grounds of their decision:" "that as the law clearly held bets under such circumstances and on subjects of a light nature to be void, the committee thought they ought to do what they could in aid of the law, by mulcting voters, under such circumstances, of their votes!" The decision was right, but the professed grounds of it were totally untenable.

† These subjects have been already discussed in Chapters XII., XIII.

378 JURISDICTION OF THE COMMITTEE—SCRUTINY.

subject has been disposed of in a previous chapter.* It may suffice to state, generally, that when once the poll clerk has recorded a vote, it must remain so recorded, unless he have palpably made a mistake. If he be satisfied on the spot that he has done so, he may then and there, in the voter's presence, correct the error; and if he refuse, a committee will do so, on proper proof: that is, by the voter himself, or by those who witnessed the transaction, and, in all probability, by producing the check books. 'If the clerk,' says Mr. Rogers, 'make a wrong entry, it ought to be corrected, if possible, at the time, publicly, and by the clerk himself. If the fact be disputed, it ought to be referred to a committee, as a disputed question of fact: for if a voter be proved to have actually voted for A., and his vote was recorded for R., there can be no doubt that the poll, which is intended to record what has taken place, not that which has not taken place, ought to be amended according to the fact. A different rule would obviously place the election in the power of the poll clerk.' It is to be observed, however, that the error here spoken of, is that of the polling clerk. It is widely different with that of the voter; who if his vote be really taken down as he gave it, is conclusively bound by the act of the clerk; but the voter may retract, and vary the name he had first given, at any time before it is entered on the poll book.

Thus far of the jurisdiction, whether original or appellate, of a Select Committee, in respect of the character of the petition itself, and of *individual* votes, or classes of votes, brought under its notice by means of a SCRUTINY. It will now be necessary to consider those complaints of a more general nature, which tend to impeach directly the sufficiency of the election or return, or both, as to either all, or some only of the candidates. This is usually sought to be effected, in consequence of non-observance of the prescribed forms of law—through the error or wilful misconduct of official functionaries,—of candidates, voters, or non-electors, and by means of general bribery, treating, intimidation, or rioting. All these subjects have been already dealt with in earlier portions of this work, but require again to be noticed, *in the aspect under which they are presented to a Select Committee.*

* Chapter X., ante, pp. 232, et seq.

CHAPTER XX.

JURISDICTION OF SELECT COMMITTEES — CONTINUED.

INFORMALITIES AND IRREGULARITIES IN THE PRACTICAL CONDUCT OF THE ELECTION.

It will abundantly appear from a perusal of the Minutes and Reports of Election Committees, in both former and modern days, that these tribunals are justifiably anxious to uphold an election which has been conducted fairly, and in substantial accordance with the law, against objections founded on non-observance of statutory or common-law regulations. They are, properly, determined to ascertain whether every elector, on an occasion challenged by petition, *has had an opportunity of expressing his will* whom he would have to represent him in parliament. If he have had such opportunity, whether he did or did not choose to avail himself of it, then the voice *of the majority is the voice of the whole electors* ;* and the House is neither entitled nor disposed to render that voice ineffectual, and virtually stultify it, by reason of minor defects and irregularities attending its utterance. It is not, however, to be supposed that the House will wink at the departure from those regulations which itself, or the whole legislature, has from time to time prescribed for so transcendently important a purpose, as the due, that is, the “free and indifferent,” exercise of the elective franchise ; for if that were the case, it would be nugatory to have any such regulations at all. It will be found, accordingly, that committees pretty steadily

* “In the election of churchwardens,” said Lord Campbell, then attorney-general, in arguing the important case of *Rutter v. Chapman*, 8 Mee. & W. 18, “who are elected by the inhabitants in vestry assembled, all are considered as being present in the vestry, all having the power to come if they choose: and then the majority of those who actually are present, represent and bind the whole. So if a church-rate is to be made, which is by the ‘inhabitants,’ all need not vote, but a majority of those who do vote, must vote for it, and then it is a rate made by the inhabitants, all being in point of law considered present at a meeting ;” for which he cited the following authorities,—*Norris v. Staps*, Hob. 212 ; *Rogers v. Davenant*, 1 Mod. 194 ; *Chamberlain of London’s case*, 5 Rep. 63 ; *Jeffrey’s case*, Id. 66 ; *Reg. v. Sutton*, 10 Mod. 74 ; *Rex v. Varlo*, Cowp. 248 ; *Campbell v. Maund*, 5 Ad. & Ell. 865.

direct their attention to ascertaining, whether the irregularity complained of *affected the result of the election*; in other words, did it actually deprive the electors of an opportunity of expressing their will? If it did not, they will uphold the election, though severely censuring and punishing those who may be proved to have been grossly or wantonly in fault. If the directions of a statute be plain, a non-observance of them would argue, of itself, a culpable degree of negligence, if not of even wilful misconduct; and all concerned should bear in mind, that to disobey a statute, is a misdemeanor exposing its perpetrator to fine and imprisonment, though no punishment be annexed, by the statute, to such disobedience. Any act, moreover, of *wilful* contravention, disobedience, misfeasance, or of commission or omission, contrary to the leading election statutes, entails a serious pecuniary liability to the party thereby aggrieved.* And beyond this, the House may not only call offenders before them, and humiliate them by a public rebuke, but commit those guilty of a gross breach of duty, to Newgate; of which an instance will be found cited in a previous chapter.† Considerations of this kind will always afford a check upon any disposition towards an indolent, slovenly, or possibly even corrupt discharge of the duties, in respect of an election, cast upon individuals, by the law. A committee, while upholding the just rights, and consulting the real interests, of both candidates and electors,—that is, of the public,—will nevertheless vigilantly scrutinize, and, if necessary, express their opinion of the conduct of those to whom the miscarriage is imputed. Thus, for instance, in the *Limerick*‡ election, which will be presently noticed, the committee, while sustaining the return against an objection that the sheriff had not kept open the poll during the prescribed number of hours in each day, thus reported to the House: “That the conduct of the sheriff had been highly improper; but the committee had reason to believe that his conduct had not arisen *from any corrupt motives*—and further, that the result of the election had not been affected by such proceedings.”

Discussions of this nature most frequently arise, in cases where it is questioned whether a particular statute, the provi-

* See, *inter alia*, stat. 2 Will. 4, c. 45, s. 76, post, 251, A.; 6 Vict. c. 18, s. 97, post, 309, A.

† Ante, Chapter IX., p. 225.

‡ P. & K. 356 [A. D. 1833], ante, p. 220, note (†); the *Coventry* case, p. 220, in the text; the *Athlone*, post, p. 383.

sions of which are alleged, or even admitted, to have been violated, be a DIRECTORY, or IMPERATIVE, or PROHIBITORY one. In the latter two cases, there can of course be no difficulty; but the practical question usually is, how a statute is known to bear one or the other of these characters, though it may not in terms declare it?—This distinction has been recognized by our courts at least as long ago as the year 1740; when, in the case of *Rex v. Sparrow and others*,* it was held that the statute (43 Eliz. c. 2, s. 1) requiring justices to “nominate overseers yearly in Easter week, or within one month after Easter,” was *directory* only. The 10th section imposed a penalty of 5*l.* on the justices for the default of any “such nomination, yearly, as was before appointed;” and “the adding a *penalty*,” said the court, “is an argument that the appointment [otherwise than as ordered] is not void; for it was foreseen that there would be inconvenience if it were not done in time, and it might therefore be proper to enforce a speedy execution of the power.” The court also adverted to the circumstance that “there were *no negative* words, as in stat. 12 Car. 2, c. 25, s. 13, as to the price of wines, where the words “*and at no other time*” are added.† In alluding to this decision, which may be regarded as the groundwork of many subsequent ones, the late learned and very able Mr. Justice Taunton thus clearly expressed himself.‡ “The distinction between directory and imperative statutes has been long known. An early instance is to be found in the case in *Strange*. I understand it to be, that a clause is *directory*, where the provisions contain matter of mere direction, and nothing more; but not so where they are followed by such words as are here—‘that anything done contrary to such provisions, *shall be null and void to all intents and purposes*.’ These words convey a direct, positive, and absolute prohibition, which cannot be dispensed with by the construction here contended for.” The case then before the court, was that of a local act empowering trustees of a turnpike road to let tolls, by a lease executed in a certain prescribed manner; and enacting that in default of its being so executed, “every such lease should be null and void, to all in-

* 2 *Strange*, 1123.

† Had this case been called to the attention of the Wakefield Committee (post, p. 388), it might have induced them to come to a different decision from that contained in their second Resolution.

‡ *Pearse v. Morice*, 2 Ad. & Ell. 96.

§ “The question, then, is,” said Lord Denman, in this case, “as to

tents and purposes whatsoever;” and for want of compliance with such provisions, the lease was held altogether void.

Lord Tenterden, again, in the case of *Rex v. The Justices of Leicester*,* supplied another test of a statute being not directory merely, but peremptory. “It has been asked,” said his lordship, “what language will make a statute imperative, if the 54 Geo. 3, c. 84, be not so? *Negative words* would have given it that effect; but those used,” in the case before the court, “are in the affirmative” *only*. It has, however, been justly observed, that *affirmative* words may be imperative, if absolute, explicit, and peremptory, showing that no discretion is intended to be given: and with regard to a *form* prescribed by an act, where it directs a particular mode of procedure, or gives a particular form, that form must be observed. *Non observata forma, infertur adnullatio actûs.*† In *Rex v. Loxdale*,‡ Lord Mansfield said—“But there is a known distinction between circumstances which are of the essence of a thing required to be done by an act of parliament, and clauses merely directory.” In a recent case § Mr. Baron Parke said that “it was by no means an impediment to construing a clause to be directory, that, if it be so construed, there is no remedy for non-compliance with the direction;” adding, with reference to the case already cited, of *Rex v. Leicester*, “from the nature of the enactment, the courts have rightly concluded, that though the legislature intended the *precise periods* to be fixed, they did not intend the consequence of a deviation to be, that the appointment should be void.”

It thus appears that in dealing with the numerous statutes affecting the conduct of elections, the legal principles of construction almost unavoidably leave to committees a certain degree of discretion, to be guided, however, by the fixed rules of law, as far as apparently applicable. These questions will be found

the effect of the words *null and void*. It is extraordinary that there should be cases, in which it has been held that these words should not have their usual meaning; but the word “void” *has* certainly been construed as “*voidable*” in some instances, where the proviso was awarded in favour of the party who did not wish to avoid the instrument, or when the party in whose favour it was made, could not take advantage of it, without acting against public policy,” *Pearse v. Morice*, 2 Ad. & Ell. 94.

* 7 Barn. & Cress. 12.

† Dwarris on Statutes, 611.

‡ 1 Burr. 447.

§ *Gwynne v. Burnell*, 2 Bing. N. C. 39, 40; and see *R. v. Norwich*, 1 B. & Ad. 310.

discussed with great ability and learning by eminent counsel, and before able committees, in the two modern cases of the *Limerick** and the *Athlone* elections.† In the former case, the sheriff had failed to keep open the poll for the number of hours in each day, required by law. The committee, after due deliberation, determined, as we have seen, “that the proceedings of the sheriffs in opening and closing the poll at hours other than those prescribed [by the then existing statutes] were highly improper; but the committee had reason to believe that their conduct did not arise from any corrupt motive; and further, that *the result of the election* was not affected by such proceedings.” In the latter [the *Athlone* case] it was conceded that the notice of the day appointed for holding the election had been erroneous. The committee determined—“that the conduct of the sheriff or his officers appeared, in that respect, to have been irregular; but the committee had no reason to believe that *the result of the election* was affected by such irregularity.” The principles of these decisions are of extensive application, and in conformity with the great majority of *well-considered* election cases. One of these principles may be thus illustrated,—the case assumed being one of a purely *directory* statute. Suppose a constituency of a thousand voters, with two candidates for a single seat, one of whom has polled nine hundred and ninety votes, and the other eight; leaving only two unpolled voters; how could the result of the election have been affected by non-observance of any provision of a merely directory character? It is to be borne in mind, however, in dealing with the case here proposed, and indeed with every one alleged to have ‘affected *the result of the election*,’ that it cannot be *ascertained* what acts or omissions have been attended with such consequences, till after an investigation by a Select Committee. It may then turn out, for instance, that if the sitting member who had polled nine hundred and ninety-nine votes out of the thousand, and his opponent only the one remaining vote,—and even that may have been his own, ‘recorded for himself,’—still every one of those nine hundred and ninety-nine votes may be afterwards properly struck off by a committee, as invalid, through having been “thrown away” ‡ on a disqualified candidate, or otherwise; while the solitary vote of the petitioner, whether his own or that of another

* P. & K. 356 [A. D. 1833], ante, p. 220.

† B. & Arnold, 126 [A. D. 1843].

‡ Ante, Chap. X., p. 231.

voter, remaining unimpeached, entitles him to the seat. If, therefore, by any improper means, that one vote had been prevented from being given, it would as effectually have ‘affected the *result* of the election,’ as though by the same means ten thousand votes had been prevented from being recorded.* This consideration tends to invest with great importance every step taken during an election, and proportionably augments the personal responsibility of those taking it. If, however, a statute contain an express *negative* provision, which has been violated,—or an affirmative provision, with the addition of words declaring anything done in contravention of it to be ‘*null and void* to all intents and purposes,’—or other words, though in an affirmative form, showing the clear intention of the legislature to have been, to use them in an imperative sense, the case is altogether different; and on proof of the facts, showing noncompliance with the act, the committee has only to obey the statute.

These appear to be the general principles applicable to questions arising out of a great majority of alleged irregularities and miscarriages in conducting the election. It now remains to specify a few cases of this description, most likely to be of frequent occurrence, and also some not exactly falling within the rules above laid down.

I. To advert, for a moment, to that document which constitutes the foundation of electoral proceedings, the Writ of Summons. It may be issued erroneously, and if it be, *every thing done under it, is void*.—A responsibility to the House of Commons attaches, in respect of the writ, immediately after it has issued from the great seal; and in cases of vacancy, the jurisdiction begins in an earlier stage, namely, from the time of the vacancy.† In the exercise of this jurisdiction, the House may be regarded as being, so to speak, lords of the writ, and may deal with it as a just discretion may dictate. They may withhold their order for issuing a new writ; cause it to be stayed for a

* “It is not a sufficient ground, said the Court of Queen’s Bench, in the case of *Reg. v Lambeth*, 8 A. & E. 356, “for impeaching an election of churchwardens, that the poll was taken with closed doors, unless it be expressly shown that some qualified person, who meant to vote, was thereby prevented from doing so;” and Lord Denman intimated his opinion, that if one such instance were shown, the court would grant a mandamus, ‘without inquiring strictly whether *the number of persons excluded was, in fact, such as to affect the result of the election.*’

† 1 Roe, 363.

time, after it has been issued; or supersede it altogether. The writ may be stayed, for instance, on a question pending as to its illegality,* or on an uncertainty as to the *vacancy of a seat*. In the *Devizes* case, referred to below,† on the assumption that a member was dead, a new writ issued; but the House having reason afterwards to believe that he was alive, superseded the writ. In a recent instance, under the impression that the late Mr. Shiel's seat for the town of Dungarvan had been vacated, by his having accepted the office of Minister Plenipotentiary to the Grand Duke of Tuscany, a new writ was ordered on the 4th February, 1851; but on the ensuing day the member who had officially done so, having discovered that the seat had *not* been vacated on the ground supposed,‡ moved that the previous day's order be read, and on its having been read, 'that Mr. Speaker do issue his warrant to the clerk of the crown in Ireland, to make out a *supersedeas* to the said writ for the election of a burgess to serve in this present parliament for the borough of Dungarvan.' In the discussion which arose as to the propriety of this course, the Attorney-General stated that the writ had been issued by inadvertence: that the borough was not in fact vacant; that no election could take place under the writ; and if it did, the gentleman elected could not take his seat. There was therefore no course but to authorize the Speaker to issue a writ of *supersedeas*.§ It is clear that when a writ for a second election issues before the 'former has been avoided, the *subsequent* avoidance of the first election will not cure the defect; but the second election will be declared void:' and so it has been decided by the House itself.|| This is in accordance with the ordinary legal rule, that though an *irregularity* may be waived, a *nullity* cannot;¶ and the issue of a second

* *Hertford*, 32nd January, 1628, 1 Journ. 921. Suppose, for instance, after a petition on the ground of bribery has been referred to a Select Committee, the member petitioned against (whether the seat be prayed for, or not) is appointed to an office under the crown: can a new writ issue? Pending the proceedings before the Select Committee? Suppose they should declare the seat void, on the ground of bribery: the sitting member would be incapable of standing at the new election.

† *Devizes*, 30th April, 1765, 30 Journ. 386, 391.

‡ Ante, p. 180.

§ Hansard (3rd Series), iii. 134—8. The attorney-general stated that of course Mr. Shiel, feeling the duties of his post abroad incompatible with the discharge of his duties to the House, would doubtless take steps to vacate his seat.

|| 8 Journ. 258, 264, 271; Orme, 14.

¶ Where a legal proceeding is *altogether* unwarranted, and different

writ, while the seat is full by virtue of the issue, due execution, and return, of a former writ, is palpably a nullity.—It is possible that some such contingency may occur, without its having been discovered till after the member has taken his seat, and even acted for some time, and as a member of election or other committees. What steps the House might take on such a state of things having arisen and been pointed out by a duly delivered and properly framed petition, alleging on valid grounds the improper issuing of the writ, or its having any other imperfection, remains to be seen; as also how the point might legitimately come before a Select Committee, as constituting ‘the subject-matter of an election petition.’

II. A fertile source of vexation and difficulty formerly existing in respect of the question as to the proper persons to discharge the duties of Returning officer, as all the elder election law books amply evidence, was long since destroyed by the House of Commons itself discreetly determining that “*wherever the election itself had been fairly made,*” * the House will not regard the distinctions between a *de jure*, and *de facto*, returning officer. To avoid ‘such difficulties,’ says Serjeant Heywood, ‘the law of parliament has departed from the general law of the land, [i. e. that by *common law* all elections of corporate officers from that which, if any, ought to have been taken, then it is a nullity, cannot be waived (per Tindal, C. J., *Coates v. Sandy*, 2 M. & G. 316), and everything done under it is void. When, however, the proceeding adopted is that prescribed by law, and the only error consists in the *mode* of taking that proceeding, that error is an *irregularity*, liable to be taken advantage of *promptly*, but capable of being waived by the laches, or acts, of the opposite party. These are important distinctions, often involving, in the case of a nullity, most serious consequences.—A writ of summons is a *nullity*, if dated on a Sunday, and lapse of time will not waive it (*Hanson v. Shackleton*, 4 Dow. Pr. Ca. 48); so is the service of it on a Sunday, the statute 29 Car. 2, c. 7, s. 6, declaring every such service “void to all intents and purposes” (*Taylor v. Phillips*, 3 East, 155). An *irregularity*, as contradistinguished to a nullity, may be illustrated by the case of *Coates v. Sandy*, 2 M. & G. 316, above referred to. The statute 2 & 3 Will. 4, c. 39, s. 10, enacted, that “no writ issued by authority of that act *should be in force* for more than four [now six—stat. 15 & 16 Vict. c. 76, s. 11] calendar months from the day of the date thereof, including the day of such date;” but as Mr. Justice Maule observed, “the statute did not say, that *in no case shall service after the four months be valid*” (Id. p. 317); wherefore a service after the prescribed period was held, in that case, as well as in *Hamp v. Warren*, 11 M. & W. 103, to be no more than an irregularity, which may be taken advantage of, promptly, or waived by laches and length of time. On these principles the Courts at Westminster act uniformly.

* 1 Roe, 443.

depend on the legality of the election of the presiding officer, who must be not only in possession of the office *de facto*, but entitled to hold it *de jure*]: and elections made under usurping presiding officers, where there has *been* the form of an election, have been uniformly supported.”* Since statute 2 Will. 4, c. 45, moreover, which declares who is, and who shall be declared to be, a returning officer, it is not easy to see how practical questions can readily be supposed to arise on this subject.

In the year 1842, however, a case† arose before an election committee which strongly illustrates the principles governing this tribunal in dealing with such cases. A gentleman (Mr. Houldsworth), who had acted for nine years as returning officer of the borough of Wakefield, on the 5th March, 1842, was again appointed by the sheriff, his deputy making out the appointment in the usual form, but, contrary to his usual practice, omitting to give him written notice of the fact: but there was evidence, on which reliance might be placed, that he had been told of it. Wishing, however, to become a candidate at the election in the ensuing June, he wrote to the sheriff, tendering his resignation, on the ground of having already served the office; and the sheriff, by a document reciting that Mr. Houldsworth “*having repudiated* the said office,” assumed to appoint a Mr. Barff as returning officer. He appeared at the election, and acted as returning officer, notwithstanding a protest made to him on the hustings that he was not such officer, but that Mr. Houldsworth was. The latter gentleman presented himself as one of the two candidates; and public notice was given, by placards and otherwise signed by the other candidate and two electors, that Mr. Houldsworth was incapable, as returning officer, of being elected, and that all votes given in favour of him would, ‘by reason of such incapacity, be lost and thrown away.’ Mr. Houldsworth having been nevertheless returned, two petitions were presented, one from Mr. Lascelles, the candidate, and the other from two electors, setting forth the above facts, and ‘praying’ that the return might be declared void, that Mr. Lascelles ought to be returned as duly elected, and that the return might be amended accordingly. The three questions elaborately and ably argued were, whether Mr. Houldsworth was disqualified on the ground suggested; whether Mr. Barff was competent to hold a valid election; and whether the

* Heywood on Borough Elections, pp. 62, 63.

† Barr. & Aust. 270—319; ante, pp. 192, 193.

8 JURISDICTION OF SELECT COMMITTEES—

electors had had such notice of Mr. Houldsworth's ineligibility, as to render votes given for him, after such notice, *thrown away*,* so as to entitle Mr. Lascelles to have been returned. These questions were thus answered by the resolutions of the committee. *First*, that Mr. Houldsworth *was* the returning officer at the time of the election, and, as the proper officer to whom the precept ought to have been directed, was himself incapable of being elected at that borough. *Secondly*, the committee "*declined to declare*" the election and return void on the ground stated by the counsel for the sitting member—viz., that stat. 7 & 8 Will. 3, c. 25, s. 1, having required the precept to be delivered to the proper returning officer, 'and *to no other person whatsoever*,' the delivery to any other person was wholly null and void. This argument was successfully encountered by the reasonings already laid before the reader in a preceding page, as to the sufficiency of a *de facto*, as contradistinguished to a *de jure* returning officer. The introductory words of this resolution indicate the high degree of doubt which the committee justly entertained, as to the propriety of the decision at which they had arrived. A lawyer would ask, how it was possible for a statute to have used stronger words of peremptory prohibition than those which had been pressed on the committee—"and *to no other person whatsoever*:"—it had not only specifically required the precept to be delivered to one person, but proceeded to prohibit its being delivered "to any other whatsoever." *Thirdly*, the committee held, by their third resolution, striking off the vote of an elector, that sufficient notice had been given of Mr. Houldsworth's ineligibility: and the petitioner's name was ultimately substituted for that of the sitting member.†

III. The course to be pursued at elections for counties and boroughs, has been pointed out with care and some minuteness in the ninth chapter.‡ To it the reader is referred, for information as to the various stages of an election, as well as to the statutes there referred to, and which will be found arranged at the end of the volume, in chronological order. It may also be well to bear in mind, on consulting either, the principles laid down in the commencement of the present chapter, as to the distinction between directory and imperative provisions in those

* Ante, Chap. X. p. 230.

† The disqualification of the returning officer is not expressly statutory, but by the common law of parliament.—Ante, pp. 192, 193.

‡ Ante, p. 199, "The Returning Officer and the Election."

statutes; the effect of non-observance of them upon *the result* of the election; the disposition of committees to uphold fairly conducted elections; and the liabilities incurred by those who have been in fault, although the result of that election be upheld. It is manifestly the duty of the returning officer to adhere as closely as possible, in every instance, to the very words of the statutes which are applicable, and never affect to treat those words as directory *merely*, which he can easily and prudently regard as *imperative*, except in the case of some great and sudden emergency, apparently justifying a different procedure; and which he may, advantageously, regard as nevertheless hazardous.

IV. It is conceived that there is nothing to prevent a candidate personally offering himself for the choice of the electors, as it is certain that he may also vote for himself;* but that he may be proposed or seconded, in either his presence or his absence, by another, it ought to be by one of the electors. The writ of summons requires the sheriff of each county to cause to be elected the knights, citizens and burgesses for his county and the boroughs or universities within it, “by those who shall be present, according to the form of the statutes in such cases made and provided, at *his county court, to be holden* for the purpose of the election;”† and none has strictly a right to be in that court, taking part in the election, but the candidates, electors, and the functionaries required to conduct it. It is, however, sufficiently notorious that this rule is not in practice observed; as, equally in county and borough elections, a great number, if not indeed the majority, of persons present consists, almost unavoidably, of non-electors, whose show of hands would, if not nullified by the demand of a poll, undoubtedly decide the election. They thus as completely ‘personate’ electors, in the strict eye of the law, as by giving votes at the poll in the name of electors; exercising, in each case, the functions of electors only: but the former is a case with which the law cannot deal penally, as with the latter, without sacrificing the inestimable benefits of publicity. This circumstance, however, serves to show at once the absurdity of attaching any weight to a show of hands, and the importance of the act of duly demanding a poll, as will presently be more dis-

* “This is clear,” says Serjeant Heywood (*Counties*, 207, where various instances are collected), “but a *little extraordinary*.”

† Post, pp. 441, 442.

tinctly explained. Two centuries ago, Glanville, in his report of the *Southwark* case,* states that the committee affirmed, in their report to the House, that “the truth had not been tried out by the poll, which is the only certain means rightly to decide the difference, in case of opposition, especially where *others are present besides the electors, who, in holding up their hands, or sounding of voices, or separation of companies, or the like, amongst a multitude, cannot be distinguished from the electors.*”

In the text-books of election law, it is usually said—“the returning officer is then to call *upon the electors* to name the candidates;”† and in Mr. Roe’s Treatise‡ it is expressly declared that—“The usual way is ‘for the sheriff to ask *the electors* whom “they please to serve them in Parliament? Whereupon each candidate is proposed *by one elector*, and seconded by *another.*” and Mr. Male§ quotes this little paragraph *verbatim*. The electors, indeed, may surely refuse to hear any but one of themselves, or the candidates for their suffrages; and have a reasonable right to resist the intrusion and intermeddling of a stranger, when in the exercise of the highest rights with which citizens are invested by the constitution. When a non-elect is desirous of addressing those who are such, at a particular election, he sometimes takes the course adopted by the late Mr. Daniel O’Connell on several occasions, of procuring himself to be proposed as a candidate; in which capacity he is entitled to address the electors; at the close of his speech announcing that he withdraws from the contest. It is not, however, as will presently be seen, in his power to do so, if the electors should resolve to return him.—It is worthy of notice, that in Scotland, by stat. 2 & 3 Will. 4, c. 65, s. 30, it is expressly declared that it shall be “always competent for *any registered voter*, provided he shall first satisfy the sheriff that he is truly registered, by producing an extract of his registration, and taking, if required, the oath in Schedule (I.), to put any person in nomination:” but it should be remembered that popular elections were then for the first time introduced into Scotland: || and the insertion

* Glanville, p. 10.

† Vide, inter alia, Shepherd, p. 75.

‡ Vol. I., p. 566, note (b) [A. D. 1818].

§ Law and Practice of Elections, p. 100 [A. D. 1820].

|| Ante, p. 12. The Scottish Reform Act bears many traces of its having been framed less accurately than that for England. In the 29th and 30th sections, for instance, though ‘only as many candidates are

of such a provision perhaps affords some evidence of the Legislature's having acted on the assumption that it was in accordance with the "usages" existing in England.

Returning, however, to English elections: if two strangers may nominate and second a candidate, so may either of them demand a poll, and do other acts for which the law certainly affords no sanction, in the case of a stranger. It seems clear, however, that only a candidate or an elector can demand the poll*—as "a party interested in the competition," to adopt the language of Sir John Simeon†—"such person is entitled to try the question." A poll, moreover, must be demanded, according to law, or the sheriff is not bound to grant it; and Lord Coke‡ expressly lays it down, that "For the election of the knights, if the *party* or the *freeholders* demand the poll, the sheriff cannot deny the scrutiny: for he cannot discern who be freeholders, by the view; and though the party would waive the poll, yet the sheriff must proceed in the scrutiny."

This sentence points authoritatively to another important proposition in election law—that a poll having once been demanded, cannot be waived by or on behalf of even him who had demanded it; but may be said to enure to the benefit of every elector, many of whom that demand may have alone induced not to make one themselves, relying on that already made. They may have gone away under that belief; knowing that many hands held up were those of strangers:—and entertaining the strongest objections to persons who, but for the results of such demand, would be foisted upon them as their representative. "If any party," says Whitelocke, "in competition, or the freeholders electors, do upon the election demand the polle, the sheriffe cannot deny it; and though the demanders of it doe afterwards waive it, yet the sheriffe must proceed in the scrutiny: so tender of the freedom and indifferency of elections, is the law of parliaments."§ It has accord-

proposed as there are vacancies to be filled up, they are to be declared duly elected "*on a shew of hands!*" It may be asked, suppose none were held up, on the sheriff putting the question: or suppose all, or a majority against an *only* candidate? It is conceived that the sheriff would be justified in disregarding altogether what is at most a mere directory regulation, and that of an inadvertent and insensible character.

* 1 Roe, 577.

† P. 156.

‡ 4 Inst. 48.

§ Whitelocke, Chap. 42, vol. 1, p. 387.

ingly been repeatedly held, that the refusal of a poll, when duly demanded, not only avoids equally county and borough elections,* but also subjects the returning officer to an indictment for a misdemeanor.†

V. The proper mode of conducting popular elections, in respect of demanding and taking the poll, according to the common law, has frequently, of late years, been the subject of discussion in the ecclesiastical and common law courts. The leading authority is a judgment of Lord Stowell,‡ which was declared by the late Chief Justice Tindal, in delivering the judgment of a court of error in the case of *Campbell v. Maund*,§ to be “entitled to the greatest consideration, in a matter of that kind:” and he then cited the following passage from that judgment, which related to the validity of the election of a churchwarden:—

“When a poll is demanded, *the election commences* with it, as being the regular mode of popular elections: the show of hands being only a rude and imperfect declaration of the sentiments of the electors. It often happens that, on a show of hands, the person has a majority, who on a poll is lost in a minority; and if parties could afterwards recur to the show of hands, there would be no certainty or regularity in elections. I am of opinion, therefore, that when a poll is demanded, *it is an abandonment of what has been done before*; and that every thing anterior, is not of the substance of the election, nor to be so received.” In the case before the court of error, the chief justice proceeded to say—“Here the poll was demanded: the supposed election by show of hands is therefore a nullity. . . . In the nature of the thing, the demand of a poll never is, nor can reasonably be expected to be made, until the necessity for such a demand arises:—that is, until one of the contending parties is dissatisfied with the decision upon the show of hands, from which that demand is in the nature of an appeal.” “The *common law* right,” said the Court of Queen’s Bench, in a subsequent case,¶ is generally understood to be, that any

* 1 Roe, 573.

† See the authorities cited in Rogers on Elections, 17.

‡ *Anthony v. Seger*, 1 Haggard’s Cases in the Consistory Court, 13.

§ 5 Ad. & El. 880.

|| Id. p. 881.

¶ *Rex v. St. Pancras*, 11 Ad. & Ell. 26.

voter, however satisfied with the correctness of the declaration on the show of hands, may yet appeal from it to the whole body of electors; and keep a poll open till all have had an opportunity of attending to record their votes." In this last-mentioned judgment, the court thus satisfactorily dealt with a topic which had been pertinaciously pressed upon it:—

"It was boldly urged that the decision of a returning officer is binding and conclusive, however partial and unfair, *and in* whatever degree his partiality and unfairness may have affected the result of the election.* 'What he chooses,' it was said, 'must stand, though his misconduct may expose him to punishment.' The claim of such a privilege refutes itself. Mere feelings of partiality in a returning officer towards the successful candidate cannot, indeed, be sufficient to vacate the election conducted fairly, and with regularity: but if proper measures are taken for challenging an election good in form, but reasonably supposed to be the result of manœuvring, for selfish or party purposes, we cannot be bound by a result so brought about. The temporary inconvenience, though much to be lamented, which may be produced by changes, and new elections, is an evil infinitely less than the encouragement which would be held out by this court to an arbitrary and corrupt abuse of lawful power."†

VI. Assuming, however, that a candidate ought not to be proposed by any body but himself, or be proposed and seconded by an elector, the question arises, what effect would be attached by a committee to a disregard of this rule? Surely they would not hold that it had vitiated the whole election! To attach to such an irregularity so serious a result, would be equally unreasonable and unjust. The great point to be kept in view is, the rights of the electors: and if, however the candidate may have been brought to their notice, *they have adopted him* as their representative, by recording their votes in his favour, what can it signify that there had been some irregularity in bringing him to their notice? The proposer or seconder may not have been known to be non-electors. In large constituencies, it is impossible for the returning officer, or any one else, to decide whether they be or be not such, and to run the

* The *italics* are those used in the written judgment.

† 11 Ad. & Ell. 24.

serious risk of being wrong. If the returning officer be satisfied that the fact is such, he will be justified in refusing, and is, indeed, bound not, to allow a non-electors to take part in the election. If, however, he do not take that step, can it be said that, on notice being duly given that the candidate is ineligible on the ground in question, all votes for him are thrown away? It would seem to be assuredly not so, and that there is no case on record of such having been held to be the common law of parliament. Every elector, by recording his vote, may be said himself to 'nominate' the candidate for whom he votes: and in point of law, as far as regards the validity of such a vote, a non-electors's nomination at the commencement of the election, may be regarded simply as though some one in the crowd, by suddenly shouting out the name of some individual, had suggested his name to the electors who proceeded according to law to record their votes for him. If an election, otherwise valid, be not avoided, as we have seen that it is *not*, by its having been conducted by one who was *de jure* no returning officer, it is preposterous to suppose that it could be avoided by, comparatively speaking, so trivial an irregularity as the candidate's having been proposed or seconded by one whose own name was not on the roll of electors, nor had any right or pretension to be so.

Finally, any such irregularity would, doubtless, be considered by a committee, provided that irregularity had not affected the result of the election, to be waived by the taking of the poll: and this in accordance with the principle laid down by the Court of Queen's Bench in the deliberately-considered case already cited*—

“As in point of fact a poll was granted, and actually taken, between the contending parties, we hold that there has been a complete waiver of *any irregularity in point of form* in the mode of demanding the poll, even if any such irregularity had existed.”

VII. It has been stated incidentally in a previous part of this work,† that a new candidate may be put in nomination at any time after the day of nomination, and during the polling; and such may perhaps appear to be the case according to a correct

* *Campbell v. Maund*, 5 Ad. & Ell. 881.

† Ante, p. 229.

construction of statutes 2 Will. 4, c. 45, and 5 & 6 Will. 4, c. 36. The former, it is true, distinguishes in point of time between the proceedings on the first day of the election and those at the polling; but that is conceived to be a regulation aimed at securing only the convenience of taking the poll, which then for the first time was appointed to take place in several districts and polling places *simultaneously*; but if the legislature intended to have prohibited any votes being recorded for a candidate who had not been publicly proposed on the day appointed for the commencement of the "*election*," it has at all events not distinctly said so. *Quod voluerunt, non dixerunt*. All it has said is,* that 'the *polling* in England shall commence,' in counties on the next day but two after, and in boroughs 'on the day next following the day fixed for the election;' but the two acts in question do not say that the first day of the election is to be exclusively appropriated to the 'nomination' of candidates, and the second to polling for those then nominated. Even the word 'nomination,' or "nominating," is not used in the act of 1832, as it is in the Scottish Act;† nor is it said what 'is to be done on the first day of the election. Undoubtedly, however, the word "nomination" occurs in statute 5 & 6 Vict. c. 36, s. 8; and it is several times there mentioned in a way warranting the inference that the legislature may have contemplated the first day's being appropriated to the ceremony of nomination, exclusively of the polling (and the same observation applies to the recent Irish Act, statute 13 & 14 Vict. c. 68, s. 18), but not that a candidate should *not* be proposed during the polling, or on the days appointed for it. Previously to the year 1832, a candidate might be proposed at any time during the polling, even on the very last day, or hour, of the election, of which the election treatises and reports afford numerous instances. One out of many is afforded by the great case of Edmund Burke, at Bristol.‡ The election commenced on the 7th October, when there were three candidates, all of whom demanded a poll, which was proceeded with, and adjourned to the ensuing day, when one of the three retired. On that day Edmund Burke was for the first time brought forward as a can-

* 2 Will. 4, c. 45, ss. 62, 67, post, 245, A., 247, A.; 5 & 6 Will. 4, c. 36, s. 2, post, 259, A.

† Ante, p. 45; post, p. 28, A.

‡ 1 Dougl. 244.

didate; the poll was continued; and he was returned with one of the two remaining candidates. The first question on the petition was, “whether a person may be elected, who becomes a candidate on a day subsequent to that on which the election was appointed to be holden, and on which the poll commenced?” After full argument, the question was decided in the affirmative, and Mr. Burke was declared duly elected. Now all “laws,” “statutes,” and “usages” are in full force, except “so far as any of them are repealed or altered by or are inconsistent with the provisions” of the three Reform Acts of 1832. Is, then, *this* ‘usage’ so inconsistent? It may be argued, that no elector is *bound* to be present in the Sheriffs’ Court when the election is opened. He may not have been able then to attend; and if he did, he may not have heard who was proposed by a brother elector; or if he did, may have chosen to disregard it, and give his vote for a candidate of his own selecting, but on whom he may not then have determined. As he once had this important right, what statute has deprived him of it? And how clear ought its provisions to be!—What ought to prevent three or four hundred, or as many thousand voters, on hearing, only after the nomination, that persons deemed objectionable have been proposed, agreeing to give their votes for none of them, but for others? If it should be said that those who have already voted for candidates might have refused to do so, and voted for those subsequently brought forward, had they known of it, the answer may be, that those voters must be taken to know, when giving their votes, that any other elector may bring forward a new candidate at any time. Has the returning officer any right to refuse votes given for candidates, simply because they had not been formally nominated on the first day of the election? Where is such a power conferred upon him? Where is his authority for asking more than the question—“*For whom* do you vote”—and limiting it to “For which of the candidates nominated on —— last do you vote?” During the general election of 1852, on the first day of the polling, a county voter insisted on giving his vote for one of the candidates, and the voter’s own brother. He was several times refused, on the ground that his brother had not been ‘nominated;’ and at length a considerable number of other electors agreed to give their votes, and demanded of the returning officer to record them, for two others than the persons

who had been nominated on the first day. If a petition had been presented, as was threatened, and one was actually—prepared, and security obtained for prosecuting it,—the point under discussion must have been decided by a select committee; and it is not easy to see on what grounds they could have decided against the electoral right on which it was founded. It might be urged again that of two candidates nominated on the first day, one or even both might die the same evening. Why cannot one or two others, as the case might be, be brought forward by the electors, on the day appointed for the polling? If there was only one vacancy, with but two candidates, and the one for whom a poll had been demanded was the one who had died, are the electors to have the other forced upon them, every one being bitterly opposed to his principles, and personally hostile to him? We have seen that a poll once demanded must be granted, and carried out till lawfully closed. Would the returning officer, in the case proposed, allow the poll to go on, and return the only candidate formally nominated, or a *dead man*, for whom all, or a majority of votes, had been recorded? Or would he venture to return the surviving candidate *instantly*, without any polling, as one who had been “freely and indifferently chosen” by the electors? Having sworn to return such person or persons as shall to the best of his judgment appear to have the majority of legal votes,† is he,—knowing (for he will be taken to know the law,) that the demand of a poll has altogether annihilated the show of hands,‡ and left matters exactly as though, without any show of hands, a poll had been demanded in the first instance,—to return a man for whom not a single vote is recorded? or the dead man for whom all

* A case exactly analogous to that put in the text will be found in the argument on behalf of Mr. Burke, in the *Bristol* case (1 Dougl. 258). Suppose in the case of only three nominated at the inquiry—A., B., C., the last is obnoxious to the majority of the electors, and consequently has no chance against A. and B.: but a corrupt agreement is entered into between A. and C., that after the first day’s poll, A. shall retire: then the unpolled electors must persist in voting for A., or not vote for a second member at all; or give their votes for C., who must, if he have a single vote, be returned as duly elected, even if he were that person in the world whom the major part of the voters would least wish to have for their representative! In this case, however, it seems not to have occurred to counsel that A. might have been elected against his will, and compelled to serve. Vide post, p. 398.

† Ante, p. 209; stat. 2 Geo. 2, c. 24, s. 3, post, 189, A.

‡ Ante, p. 392.

are recorded, and have been therefore thrown away?* or will he run the risk of being committed to Newgate for making a special return stating not only the facts above supposed, but also this other, that he had refused to allow a great majority of the electors to vote for a third candidate proposed by themselves? For these and other assignable reasons, it might be perhaps concluded that the true solution of this and similar difficulties which may be conceived, is to recognize the right of the electors, in spite of possible inconvenience, to nominate their own candidates, at any time during "the election." If the legislature should consider those inconveniences serious, and one, for instance, might possibly be deemed the nomination of fifty different candidates for a single vacancy, none of whom had given any security for the expenses,† it can at once interpose, by prohibiting votes being recorded for any one that was not publicly and duly proposed and seconded in the presence of the returning officer, on the first day of the election. In the mean time, if the electors still possess the right in question, it affords an additional reason to the returning officer, were any requisite, for regarding the demand of a poll, once duly made, as irrevocable, and to be continued till closed in due course of law: to afford the double opportunity to the electors of proposing what candidate they please, at any time during the election, and of voting for one so proposed.—It is not uncommon, it may be added, for a returning officer to feel himself suddenly embarrassed by an intimation from those who have demanded a poll, that they withdraw it. They have, however, no power to do so.

VIII. In considering the question before us, it may be advisable to remind the readers, that electors may nominate and elect any eligible person they please, not only in his absence, and without his knowledge, *but against his will*. This doctrine

* Ante, Chapter X. p. 230.

† A candidate proposed at the nomination, but after the show of hands declining to go to the poll, though he may, contrary to his wishes, be nevertheless elected, is not liable to any part of the expenses of erecting booths, hiring poll-clerks, &c. *Muntz v. Sturge*, 8 M. & W. 302 (ante, p. 227). "The post of returning officer," said Lord Abinger, on deciding that case, "may be one of an onerous character, and the legislature may well have considered that to be a far less evil than it would be to prevent proper persons from being proposed, under the fear that the proposers might afterwards become liable to the expense of a poll, in which they may have taken no part."

is well established; and is thus tersely and lucidly stated in Glanville's Report of the *Gloucester** case, upwards of two centuries ago, and recently.

“The first question in law, moved and debated, was, whether Sir Thomas Estcourt was eligible, against his own consent, and contrary to his desire: and it was held clearly, that he was: and that no man, being lawfully chosen, can refuse the place; for the country and commonwealth have such an interest in every man, that when, by lawful election, he is appointed to the public service, he cannot, by any unwillingness or refusal of his own, make himself incapable: for that were to prefer the will, or contentment, of a private man, before the desire and satisfaction of the whole country, and a ready way to put by the sufficientest men: who are commonly those, who least endeavour to obtain the place.” This doctrine is constitutionally sound; and serves, for at least one purpose, to defeat a corrupt bargain between a popular candidate and another, that the former shall retire in the latter's favour. The electors who were intended to have been made the victims of this derogatory compact, have thus the power of avoiding the disgrace of being *mis-represented*.†

IX. The hours for opening and closing the polls, clearly fixed by the statutes of 1832, and others passed subsequently, will be found stated correctly in the ninth chapter.‡ It seems superfluous to say, that it is the returning officer's duty to adhere, if only for the sake of his own safety, as closely as possible to these distinct and carefully-prescribed regulations of the legislature; but his default, though exposing himself to peril, will not affect the validity of an election, unless the result of it can be shown to have been affected by that default. He must remember, however, that his unlawful prevention of a single vote's being recorded, in even the case of an overwhelming

* P. 101.

† See also the *Nottingham* case, 1 Peckwell, 77, 83; and “a very strong instance of a person's being chosen, and obliged to sit against his will, in this very city of Bristol,” given by Mr. Douglas in his first notice to the case of Mr. Burke (*ante*, p. 395), 1 Dougl. 281, note (a). ‘It is a settled principle of parliamentary law,’ says Mr. May (p. 435), ‘that a member, after he is duly chosen, cannot relinquish his seat:’—but he may effect that object, by refusing to take the qualification oath.

‡ *Ante*, pp. 218, 219; in Scotland, p. 45; in Ireland, pp. 58, 59.

majority which cannot be affected by ten times all the votes unpolled, may affect the *result* of the election. One vote may suffice to give the seat to the petitioner, and of that vote he may have been unlawfully deprived by the returning officer. The cases in which questions of this kind are most likely to arise, are those relating to the time of *closing* the poll, and that chiefly in respect of disturbance and rioting. These latter matters will be discussed in the next chapter. In the mean time it may suffice to say, that in English counties, the polling commences at nine o'clock a. m., on the first day, and continues for seven hours; and continues for eight hours on the second day: and it is peremptorily enjoined that “no poll shall be kept open *later* than *four* o'clock in the afternoon of the second day.” In English boroughs the polling commences at eight a. m., “and no poll shall be kept open *later* than four of the clock in the afternoon.” If, notwithstanding this prohibition, the poll were to be kept open *beyond* the limited hour, the effect would be that all votes afterwards given would be void, and might be struck off the poll. It would hardly be a case for avoiding the election.

In the case of a poll *opened too early*, all votes then given would in like manner, probably, be held void, equally as if they had been given on the preceding day:—and if the poll be *opened too late*, the election would probably be set aside, if it could be shown that when the hour for closing the poll had arrived, there were voters unpolled who would or might have polled had there been the full time allowed by law;—so that the result of the election had been affected; but—nothing is to prevent the returning officer “from closing the poll previous to the expiration of the time fixed by this act, *in any case where the same might have been lawfully closed before the passing of this act* :” and it is further expressly provided, that in case of interruption or obstruction by any riot or open violence, he “SHALL NOT, *for such case*, terminate the business of the nomination, nor FINALLY CLOSE the poll,” but *adjourn* either from time to time, till the interruption or obstruction shall have ceased; minute directions being given as to the mode of such adjournment.* It is also expressly provided that the state of the poll shall not be finally declared, nor the proclamation made of

* 5 & 6 Will. 4, c. 36, s. 8, post, 259, A.

the member or members chosen, until the adjourned poll shall have been finally closed, and the poll-books delivered or transmitted to the returning officer. Thus it appears that the legislature has merely fixed the limit *beyond* which the polling shall not last, without saying, either expressly or impliedly, that it shall continue up to that limit. On the contrary, the reservation of the returning officer's power to close the poll, as it existed previously to the year 1832, in both English and Irish cases, clearly shows that he is left a discretion in the matter. If, for instance, in a borough election, with only 1000 voters, 900 have polled by ten o'clock, and no voter poll during the ensuing two hours, and the majority be such that it cannot be affected at the election; and the returning officer be not required to keep open the poll, and especially if he give due notice of his intention to close it:—in such and similar cases there is no doubt that he may do so, in both counties and boroughs. He will act on the belief that the election is virtually decided,—alike in the opinion of himself, the candidates, and the electors, for that the contrary would be signified by voters continuing to poll, or a protest being made against closing the poll. This is peculiarly applicable, to the case of a poll having been demanded perhaps improvidently, and before the polling has commenced, or during its continuance, the returning officer receiving notice that those who demanded withdraw it. He must nevertheless open the poll; and after waiting for a reasonable time, and finding that no voter polls, the returning officer may close the poll now, as he might have done before the year 1832; but it will always be prudent to give notice of his intention as publicly as may be.*

In *Scottish* counties the poll is not to exceed 'two consecutive free days'—and be kept open only between nine o'clock in the morning and four o'clock in the afternoon of the first day, and eight o'clock in the morning and four o'clock in the afternoon of the second day: but "the poll at any one place, in either counties or boroughs, may be closed before the termination of the said two days, if all the candidates or their agents, and the sheriff, shall agree in so closing it."† The same provisions are made to meet the case of riot or open violence, that are contained in the English act, with the important exception,

* See Heywood on Counties, pp. 386, 388.

† 2 & 3 Will. 4, c. 65, s. 32.

that the returning officer is *not* prohibited, as in England, from terminating the nomination, nor “finally closing the poll,” in such case.

In SCOTTISH *burghs* the poll is to be kept open for one day only, and that only between the hours of eight and four o'clock; and the poll at any one place may be closed at any time, on the agreement of all concerned, as in counties,* or adjourned in case of riot or open violence.

In IRISH *counties* the poll may be kept open for two days only, and commence at nine a. m. on the first day, and eight a. m. on the second day; and be kept open ‘*only*’ between nine a. m. and four p. m. on the former, and eight a. m. and four p. m. on the latter: “and no poll shall be kept *open later* than four p. m. on the second day.”†

In IRISH *boroughs*, the poll commences at eight a. m. on the day *next but one* after the day fixed for the election; and “shall continue for such one day only; and no poll shall be kept open longer than *five* o'clock in the afternoon of such day.”‡ The same power as in England is reserved to the returning officers of Ireland, to close the poll previous to the expiration of the time fixed for that purpose, “in any case where the same might have been lawfully closed before the passing of that act.”§ Similar but more extensive powers than those entrusted to the returning officer in England, are vested in the returning officers of Ireland, of adjourning the poll, (but with the same prohibition as in England against terminating the business, of the nomination, or FINALLY CLOSING the poll,) in the case of interruption or obstruction by any riot or open violence at *or near* the place of election or a polling place, or *elsewhere*, by the violent or forcible prevention, obstruction, or interruption of voters *proceeding on their way to such election or polling place*, provided *this last* prevention, obstruction, or interruption be shown *by affidavit*. The adjournments are to be continued as long as they may be necessary; and the state of the poll is not to be finally declared, until the adjourned poll shall have finally closed, and the poll books been delivered or transmitted to the sheriff.

* Stat. 5 & 6 Will. 4, c. 78, s. 5.

† Stat. 13 & 14 Vict. c. 68, s. 1, §post, 77, A.

‡ Id. s. 15.

§ Id. s. 18.

It will thus be seen that the legislature has fixed the hours beyond and between which, *only*, in all the three kingdoms, polls shall be taken; in Scotland expressly allowing the poll to be closed *before* the appointed time, if the candidates, electors, and sheriffs agree to do so; both in England and Scotland the same power of closing the poll being generally reserved to the returning officers, which they possessed before the year 1832. It has also been seen, again, that in the acts relating to all the three kingdoms, elaborate provisions are made to meet the case of riot and open violence at the election.

Thus stands the statute law, then, as to closing the poll, and dealing with riots interrupting the nomination, or polling; and on a careful consideration of that statute law, the object of which is to secure the freedom of elections, and also on examining the various decisions of election committees on cases of this description, and which must be presumed to have been anxiously considered by the legislature before enacting the provisions of the statutes now in force, it certainly appears to be the distinct and settled law of parliament, that riots obstructing polling, are not to be allowed to interfere with an election;—but that the returning officer's course, in such emergencies, has been authoritatively chalked out to him—that he and his deputies shall suspend all the proceedings which a riot might interrupt, as long as the least necessity exists for doing so, and on its ceasing, resume them in tranquillity and order. If he do not choose to pursue this course, he incurs a very heavy responsibility, to both the parties aggrieved, and the House of Commons. Reason, justice, and public policy, appear to justify the enactments of the legislature, and those committees who evince a determination to act in the spirit of that policy. Why, for instance, should an election return be set aside, after ten thousand voters may have polled peaceably, and in every respect legally, simply because there was, during a later period of the proceedings, a riot, however formidable, but against which the legislature had made adequate provision,—such, moreover, as would have abundantly sufficed to meet the case of such a riot occurring at *any* stage of the proceedings? For this reason it is, that in England and Ireland the returning officer is expressly, and in Scotland impliedly, *prohibited* from finally closing the poll, and with good cause; for why is the county or borough to be put to the inconvenience, and candidates to the serious vexation and expense, of

a new election, after ten thousand voters have already legitimately expressed their opinions as to whom they will have to represent them in parliament,—and why are the parties to be driven to appeal to an Election Committee after all this, simply because the returning officer had refused to obey the plain peremptory injunctions of the legislature?

If, again, any one can be supposed mischievous and wicked enough to contemplate systematic violence at an impending election, in order to deter voters from recording their votes in a particular way, the best mode of dealing with so nefarious a purpose, and deter persons from carrying it out, is to demonstrate the *utter futility** of it, by the ease with which such a purpose may be defeated. If it were a part of the object to drive an opponent to the expensive ordeal of an election petition, it would be seen unattainable, if those contemplating it were to consider that the returning officer can by, as it were, the breath of his mouth, or the waving of his hand, efficiently protect the interests so unconstitutionally menaced.

Applying these general principles to the numerous decisions of Election Committees on the subject of rioting, it will appear that they almost invariably act upon them; requiring rigorous, and, generally speaking, a practically unattainable amount of proof, that *the result of the election* had been affected by riotous interruption and obstruction: while upholding the return, however, severely rebuking the misconduct of the returning officer, and even reporting him to the House, who have on several occasions not only publicly censured, but committed to Newgate those in such case offending.

The *Cork* case † affords an illustration, and almost as strong an one as can be conceived, of the extent to which modern Election Committees will go, in acting upon the principles enun-
tiated in the text. ‡

* Ante, pp. 221, 222, 238, 239.

† Barr. & Aust. 534 [A. D. 1842].

‡ In one respect this decision does not appear a satisfactory one: for the returning officer had been repeatedly and earnestly importuned to adjourn the polling, according to the statute then in force, out of regard 'to the safety of life and limb,' which were evidently imperilled at that election, but he refused to do so—thereby, as the petitioner's counsel alleged, before the committee, "in fact giving effect to the riot" (p. 544). The only answer of the sitting member's counsel was, that the returning officer had exercised his discretion, and the poll was going on with regularity "at the moment the request to adjourn was made."

The same observation applies to the *Roxburgh* case;* which also shows the almost insuperable difficulties imposed on a petitioner on the ground of riot, adducing evidence which a committee will require to prove that the riot had affected the result of the election.† This case was argued ably and elaborately by experienced counsel; and all the parliamentary authorities then in existence, relative to rioting, were referred to and commented upon.

The *Coventry* case‡ is, by five years, earlier than the *Roxburgh* case; and the learned reporters have collected in a note a considerable number of riot cases, from the Journals of the House of Commons, from the year 1624 to 1827.§

In all these three cases, notwithstanding the strong evidence adduced before the respective committees of great violence and riot at almost every period of the election, they upheld the returns of the sitting members, on the reasoning contained in the text.

The latest case on this subject is that of the *Second Harwich*, in the year 1851,|| and requires some comment.

The petition complained that the poll had been finally closed by the returning officer before four o'clock in the afternoon, and without sufficient cause or notice for so doing: the returning officer declaring one candidate, whom accordingly he returned, to have had 133, and the other, the petitioner, 127 votes:—that at the time of closing the poll, a great number of votes remained unpolled, and by reason of its having been unlawfully

* Falc. & Fitz. 467—503 [A. D. 1838].

† “By what course of proof,” inquires Mr. Rogers, “is the fact that, but for the riot, the petitioner would have been in the majority, to be established? Are voters to be called to prove, that but for their fears they would, or they would not, have voted in a particular way? How few men have the courage voluntarily to admit their want of firmness on any trying occasion! and if willing to make such admission, who, speaking of his *own conduct*, can tell how far fear may have influenced it? Besides, if such an inquiry is to be resorted to at all, it seems reversing the order of proof, to require *the complaining party* to show what would have been the result of the election. As soon as a serious riot has been proved, the freedom of election has been violated, *prima facie*: therefore the election and return are void, and it is for those who uphold the election and return to show that the disturbance did not in fact alter what would have been the result of the election, supposing no riot had taken place.”

‡ P. & K. 335 [A. D. 1833].

§ Note (c), pp. 338, 339.

|| Printed Minutes, *passim*.

closed, several voters for the petitioner were prevented from tendering their votes, though ready to do so: that more than constituted the majority of the sitting member, were thereby deprived of the opportunity and right of voting;—that before the final closing of the poll, the proceedings were interrupted and obstructed by open violence; that the returning officer ought not to have finally closed the poll, but was bound to have adjourned the same till the following day; and that by reason of it, the election was null and void.

The committee came to the following resolutions.

“That in the opinion of the committee, the evidence adduced shows, that at the last election of a burgess to serve in this present Parliament for the borough of Harwich, the poll was closed before four o’clock.

“That the evidence shows the proceedings of the said election to have been interrupted and obstructed by open violence.

“That in consequence of such interruption and obstruction by open violence, James Woods, an elector of the borough of Harwich, who had tendered his vote, was prevented recording the same.

“That the returning officer should not have finally closed the poll.

“That the last election of a burgess to serve in this present Parliament for the borough of Harwich is a void election.”

“That Robert Wigram Crawford, Esq., is not duly elected a burgess to serve in this present Parliament for the borough of Harwich.” *

The facts of this case are confused, and the evidence was contradictory,† but scarcely beyond what was to have been expected, from the nature of the emergency, the suddenness with which it arose, and the excitement of every one present. According to the printed minutes, the election had gone on peaceably, till within four or five minutes of four o’clock; and the polling was very slack,—‘very few’ having polled since half-past three o’clock. At between four and five minutes to four o’clock, James Woods presented himself, and said he tendered himself to poll for the petitioner. The mayor and his officers were then in the booth. The poll-clerk was taking

* This last resolution appears in the report of the case in P. R. & D. (p. 321), but not in the printed Minutes.

† Vide ante, p. 219.

down the name "James Woo—" but was interrupted by some one demanding that the bribery oath should be administered: and observations were thereupon made as to whether there was time enough to do so: some saying that it wanted only four, or three and a half, minutes to four. The voter stated that he had declared two or three times that he was ready to take the bribery oath: "that they seemed all at a stand still:" that he again said, there was plenty of time to administer the oath: that some one called out to know what o'clock it was; one answered that it had then passed four, and another that it wanted three minutes and a half of four: that "at last the mayor said, we cannot take your vote"—and "as soon as they told me they could not take my vote, the booth was down—in fact, part of it was down before I could get outside the rails."* A shout had been heard from the populace standing before the booth, (who were eagerly waiting for the close of the poll, under the impression that the polling booth had then become their own property,) of "Time is up! time is up! it's four o'clock." The mayor, or some official, said—"No, not yet. It wants three or four minutes." Whether or not it really was then four o'clock, it is next to impossible on the evidence produced to determine; but probably about two minutes, or at most three minutes before four, the mob burst in upon the hustings; the mayor and all present withdrew in some confusion and alarm, leaving the voter's name unpolled; the mayor and the other authorities at once repairing to the Town Hall, where the sitting member was declared returned: the hustings were level with the ground within a minute or two's time—"almost immediately"—after the mayor had said—"No not yet—it wants three or four minutes of four." When the poll was declared, there was no objection made that the poll had been prematurely closed.†

On this state of facts, the question obviously arises, where is the evidence of the "*poll having been closed before four o'clock*" by the returning officer? It is true that a witness *said*, that while the poll clerk was taking down Wood's name, "the mayor *struck the poll*—the mayor *closed* the poll:" but the witness also stated that at that very moment, while the poll clerk was writing down the name, two men were on the top of the hustings, one of them with a pickaxe; in half a minute they began

* Printed Minutes, 18.

† Printed Minutes, 39.

to pull it down; and the mayor “jumped from the inside booth” into the space appropriated for the exit of voters, and went away, the intending voter also quitting at another point. What *act* or *declaration* of the mayor, that he was closing the poll, or intended to do so, was proved before the committee? None.* On the contrary, it was shown that when called upon to administer the bribery oath, he said, “I will do my duty;” he declared to the mob that “the time was not up”—but it wanted three or four minutes of four o’clock; and the voter himself stated, that almost while the mayor was in the act of saying “we cannot take your vote”—the hustings were down; affording an obvious reason why the ‘vote’ could not ‘be taken.’ At the Declaration immediately afterwards, no complaint was made by any one that the mayor had prematurely and improperly closed the poll. In addition to this, the evidence renders it by no means *certain* that four o’clock had not arrived before the demolition of the hustings was commenced; and finally, no evidence was offered to show that what had taken place had affected the result of the election.

Under these circumstances, the returning officer, the instant that he saw the hustings about to be demolished, ought to have ‘adjourned’ the poll, in conformity with the statute, until the following day; and he failed in his duty in not having done so; but possibly under circumstances entitling him to some little allowance. Had he done his duty, at the adjourned poll other voters besides Woods might have polled, for either party, and even if Woods alone had polled, his vote might have afterwards affected the result of the election, as ascertained by a scrutiny. The committee, however, have not found that the ‘interruption and obstruction by open violence,’ by which alone they declare that James Woods was prevented from recording his vote, did, or did not affect the result of the election. It is consistent with their finding and evidence, that the want of his vote had *not* had that effect; and if so, it seems difficult to reconcile their decision, that on this ground the election was void, with the general tenor of Election Committee decisions. Nor does their resolution that the returning officer had ‘finally closed the poll,’ ap-

* Nor does any such evidence appear in the clear summary of the facts which is given in P. R. & D. pp. 318—320, probably drawn up by one of the reporters (Mr. Rodwell), who had been one of the counsel in the case.

pear warranted by the evidence. Had it been, as such would have been a breach of the positive prohibition of the statute, the committee might have properly declared the election void. As the case stands in the evidence, it is with diffidence submitted that this decision was not warranted by either law or fact: with *law*, because the prevention of a single voter's giving his vote, was not shown, nor is found, to have affected the result of the election; with *fact*, because there seems no evidence of the mayor's having finally closed the poll.

It remains to be observed, that a riot may proceed not only by actual force and violence, but by a display of numerical strength accompanied by threats, either orally, or by menacing gestures. Though no actual violence occur, yet if the demeanour and conduct of the parties be calculated to deter a voter of ordinary firmness from going to the poll, an election conducted under such circumstances is not "free." The riot ought, however, to appear the result of system, or premeditation—and the danger so imminent as to threaten the safety of all persons concerned, and also of the poll-books.*

At the same time that the House of Commons is thus bound to deal according to law, with cases of this description, and in the way above pointed out, it is not to be forgotten that the House has an inherent indefeasible common law right to deal with matters affecting its very existence as a legislative body, who have, in Lord Holt's language, *the whole right of all the Commons of England vested in them.*† Any blow aimed at the freedom of electing its members, is aimed at the very foundation of popular liberty. Six centuries ago, our English Justinian, Edward I., at the commencement of his glorious reign, enacted,

* Though a mob should destroy all the poll books, still the returning officer may be able authentically to ascertain the true numbers polled: from the books, for instance, of the check-clerks, or from any other source on which he can really depend, he may make his return to the writ, exactly as if the poll-books were in existence. Thus in the *Longford* case, F. & F. 222 [1838], the poll-books having been lost, both parties agreed to act on a comparison of the candidates' check-books, which had been compared with the poll-books. The proof given of the loss of the poll-books will be found at p. 259 of the same report. In the *Cardigan* case, Barr. & Aust. 266 [A.D. 1842], one polling book was lost; and as the returning officer could not decide which candidate had the majority, he made a separate return of each, declaring *each* duly elected: and the committee entered into an inquiry which of the two candidates had really been returned, and decided accordingly.

† *Ashby v. White*, ante, p. 3.

with his parliament, and with impressive and special solemnity and imperativeness, that—"because elections ought to be free, the king commandeth, UPON GREAT FORFEITURE, that NO MAN, great or small, * by force of arms, nor by malice, nor menacing, shall DISTURB any to make FREE ELECTION:" which words "great forfeiture" signify, says Lord Coke, "punishment by grievous fines and imprisonment."† "This act briefly rehearseth," he continues, "the old rule of the common law, (that elections ought to be free); wherein are included, that it must be a *due* election, and it must be a *free* election. The act extends to all elections, as well by those that at the time of making the act, had power to make them [elections], as by those whose power was raised or created since this act."‡ Moreover, he observes, "the act is penned in the name of the king, and therefore he bindeth *himself* not to disturb any electors to make free election." "Before this act, in the irregular reign of Henry III., the electors had neither their free nor their due elections; for sometimes by force, sometimes by menaces, and sometimes by malice, the electors were frained, and wrought to make election of men unworthy, or not eligible, so as their election was neither due, nor free."

In the famous Declaration of Rights, the *seventh* charge against James II. is, that, forgetting or disregarding almost the greatest of our "laws and liberties," he had "endeavoured to subvert and extirpate them"§—"by violating the freedom of election of members to serve in parliament;" and the eighth of the "rights of electors" asserted and declared in the same statute is, "that elections of members of parliament ought to be free;"|| words again conspicuously appearing by way of recital in a statute of the ensuing year.¶ The words of the writ of sum-

* Nul haute home, ne auter, 3 Edw. 1, c. 5 [A. D. 1275].

† 2 Instit. 169.

‡ Id. Mr. Christian is mistaken in saying that the Act contemplated the election of sheriffs, coroners, &c., "for the House of Commons had not then existence, nor were there, consequently, elections of its members." 1 Bla. Comm. 178 (n. 47). It is shown at the commencement of this work, that the House was in existence in the year 1265 (ante, p. 2), consequently, ten years before the passing of the statute mentioned in the text.

§ Stat. 1 Will. & M. sess. 2, c. 2, s. 1.

|| Id. s. 2.

¶ Stat. 2 Will. & M. sess. 1, c. 7.

mons are, that the electors are to choose knights and burgesses “*freely and indifferently.*”

It is not by the crown alone, through its military and civil servants, using intimidation and undue influence,—(who are restrained by being, the one, bodily removed from the scene of election, and the other, by the infliction of enormous penalties and condign punishment),*—that the electors may be prevented from *freely and indifferently* exercising their franchise. Evil disposed persons among the people themselves may organize, on the most formidable scale, an effectual system of general restraint and intimidation; and this, without committing that degree “of riot, or open violence,” of which we have been speaking, and at those points of time, which arms the returning officer with the power of adjourning the proceedings before him till the interruption or obstruction shall have ceased. Those proceedings comprise only the proposing of candidates and taking the poll: and it is *actual physical force*, alone, with which he has to deal: his powers, in Ireland, extending, as we have seen, to rioting and violence, not only at, but *near to*, the place of election or polling place, or taking place *elsewhere*, by preventing, obstructing, or interrupting voters proceeding on their way *to* the election or polling place.† It is not impossible to imagine a scheme devised for suppressing the voices of the electors at an approaching contest, or coercing them to give their votes in a particular way only, concerted by those who will be astute enough to avoid exposing themselves personally to the criminal liabilities attaching to conspiracy: yet they may effect their purpose successfully. The measures taken beforehand may be in full operation throughout the election, which may, moreover, be conducted with every show of peace and order within and around the place where the election is being held: yet *really* under the pressure of enormous unseen duress. “The word ‘menacing’‡ in the statute 3 Edward I. c. 5, may appear to indicate bodily injury only; but the spirit of the act applies to whatever shall operate, through the medium of fear, to deter a voter from giving his vote according to his wishes. “The apprehension of being excluded from the sacraments of

* Ante, pp. 201, 236, 249.

† Ante, pp. 401-2; stat. 13 & 14 Vict. c. 68, s. 18; p. 83, A.

‡ “Manasce”—Lib. Horn. cited in the Statutes of the Realm, vol. i. p. 28.

the church,” continues the learned reporter of the *County of Dublin* election in 1827,* “and the menace of eternal punishment, might be far more powerful than any threat of corporal punishment.”

If evidence could be adduced before a Select Committee, in support of a petition, properly framed to meet a case of this kind,—namely, that, previously to, and during the election, there had been in existence and operation an organized system of intimidation, restraint, or violence, by which the electors at large could not, and did not, freely and indifferently choose whom they would have to represent them in the House of Commons,—it is conceived that a committee would have unquestionable power to annul an election, the result of which had been obtained by such unconstitutional and unlawful means. It would regard such an “election” and “return” as “*undue*,” and declare it void accordingly. If this be not so, parliament might be “filled with persons never duly chosen, who, by presumption, will not be indifferent;”† and the House itself would be guilty of a grievous failure of public duty. This, however, is on the supposition that sufficient evidence exists to satisfy a committee, as five jurymen judging of the facts and the inferences to be drawn from them, whether such a state of things as would vitiate the election, on the ground of systematic and general intimidation or violence had really existed. This is a matter of *evidence* merely; and the question before the committee would be, not, as in the cases which we have been considering, whether *the result* of the election had been affected by rioting, but whether, on the facts laid before them, there had been *any election at all*. A few facts, established by satisfactory proof, may justify large inferences, regard being had to the very nature of the case; and on the principle, *ex uno disce omnes*. In the case of *The Queen v. The Rector of Lambeth*,‡ it was attempted to impeach an election of churchwardens, by showing that the poll had been taken with closed doors; but it could not be proved, in point of fact, that a single person had come to the vestry to vote, and been excluded. “If,” said Lord Denman,

* Espinasse’s Report of the case of the *County of Dublin* Election, March, 1827, p. 57 (n.)

† Glanville, case concerning the Election and Return, &c. of *Chippenham*, p. 60.

‡ 8 Ad. & Ell. 361; ante, p. 384, note.

“any single person had been excluded, it might be a reason for demanding that the election should be set aside. . . . If it had appeared that any one person had been excluded, we would have gone a good way in supposing that the resolution had affected the result of the election.”*

In the *County of Dublin* case, already cited, the petition stated, substantially, that several of the clergy professing the Roman Catholic religion, in different parts of the county, had been among the most zealous agents of the two sitting members, and particularly active in endeavouring to procure their return; and used the influence they possessed, by means of their clerical character, over the consciences and conduct of their flock, in order to induce, intimidate, and terrify the freeholders to vote for the sitting members, and to withhold their votes from the petitioner;—threatened those who should vote for him with the penalties of excommunication, and that they would withhold the sacrament and other rites of their religion from such freeholders;—represented to them that he was an enemy to their religion, and that to vote for him would be an impious act, an offence against God, and a mortal sin;—and in their chapels, at or immediately after the celebration of divine service, in some cases clothed in their vestments, and in their clerical character, harangued the congregations assembled for public worship, and, in some instances, used very threatening language against all who should vote for the petitioner;—that the said Roman Catholic clergy, in many instances, indirectly threatened or intimated that such persons as would vote for him, would be in danger of losing their lives or properties; in order, by such threats and intimidations, to deter them from voting for the petitioner, and to induce them to vote for the sitting members; by means of which threats and intimidations from the Roman Catholic clergy, who have great and almost unbounded influence over their flocks, a great number of the Roman Catholic freeholders, who would otherwise have voted for the petitioner, were brought, and made to vote against him, and for the sitting members. That in pursuance of the resolution formed by the Roman Catholic clergy, with the privity, knowledge, and consent of the sitting members, to bear down and defeat the petitioner as a candidate, several of the said clergy

* For illegally confining the polling to those who had been present, at the show of hands.

constantly, during the election, attended at and near the polling booths ; and, in many instances, held up to, and showed to the freeholders, who came forward to give their votes for the petitioner, the sign of the cross ; and thereby, and by other means, interfered with, intimidated, and overawed many of the Roman Catholic freeholders about to give, and who would have given, their votes for the petitioner but for such intimidation, overawing and interfering of the priests aforesaid, who had previously, among other modes of intimidation, threatened such persons as should vote for the petitioner, with excommunication from the Roman Catholic Church ; whereby they would be deprived of the rights and benefits of being members of that church, and would be deserted, avoided, and shut out from intercourse with their Roman Catholic neighbours ; and would lose the benefit of dealing, commerce, and intercourse with them : all which unconstitutional and illegal practices were well known to, and approved and adopted by, the sitting members. That many of the Roman Catholic clergy headed and led in procession, with the privity and allowance of the sitting members, a number of freeholders, preceded and accompanied by banners, flags, and other badges and marks of distinction ; and particularly carried and used as such emblem and mark of distinction, the crucifix or cross, having thereon the following placard or motto, viz.—“*In hoc signo vinces,*” and several times placed and erected a cross in the public street, opposite to the house in which the committee of one of the sitting members sat : and which cross was also exhibited from one of the windows of his tally room, and with the privity, knowledge, allowance and consent of the sitting members did use the same as a mark of distinction and party emblem, to induce and persuade the Roman Catholic voters to vote for them ; the priests and other friends and agents of one of such sitting members, and with his privity, and with the privity of the other of such sitting members, intimating to the freeholders then assembled, that voting for the petitioner would be voting against the cross, and against our Lord and Saviour ; and many of the Roman Catholic priests also, for the purpose of overawing and preventing Roman Catholic electors from voting for the petitioner, individually went round to the houses of such electors ; and by such like unconstitutional and unworthy means, and threats of excommunication, and of their being excluded from all communion, commerce, and intercourse with

their friends and neighbours, deterred them from voting for the petitioner, and compelled them to vote for the sitting members (although they had previously promised to vote, and would, but for the conduct of the priests, have voted for the petitioner), and actually brought them in cars and carriages, and made them vote against their will for the said sitting members. That by these means, and the publicity of the influence of intimidation of the Roman Catholic clergy aforesaid, the freedom of election was grossly violated, and a great number of Roman Catholic freeholders were induced, by means of such threats and intimidations, to remain at home and abstain from voting for the petitioner.*

The petition did not pray that the election might be declared void,—but only that the sitting members might be declared not duly elected; that one might be disabled from standing again, and the petitioner substituted in his place.

If the facts stated in the petition had, in the opinion of a calm and firm committee, been proved, they would surely have led it to decide that the election was void; to report also specially to the House, which in its wisdom might have directed the offenders to be prosecuted, and perhaps even have considered the propriety of suspending the writ for a new election.

The evidence offered to establish the allegations of the petition, may be briefly stated thus. One Father Donaghue, on the Sunday previous to the election, had preached in his chapel, warning his parishioners not to vote for the petitioner, and that if any did, he would disoblige them hereafter.' One witness said that the petitioner's name had been mentioned; another, for the sitting member, however, denied this, but owned that he could understand from the sermon for which of the candidates the preacher wished the congregation to vote,—'for the candidate who would vote for Catholic freedom.' " [Note.—It was objected, but the committee overruled the objection, that the witness could not be asked questions as to what had been said by Father Donaghue.] A witness stated that he and others, afterwards applying to the same priest to hear their confessions, were asked for whom they had voted, and on hearing that it had been for the petitioner, they were turned away and he refused to hear them.† Two other priests attended at

* Pages 4—8.

† A witness for the sitting member stated that numbers had been
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the hustings, during the polling; and one frowned, clenched his fist, and put his fingers in the form of a cross at several of the voters as they came up to the poll; while the other sat with a prayer book open in his hand, with a frontispiece representing the Crucifixion of our Saviour, which he exhibited to the several voters, calling their attention to it, and bidding them remember it.*

Cars, the foremost one having a large wooden cross covered with laurel leaves, went about Dublin in procession, with placards bearing the names of the sitting members. When the foremost car came opposite to the committee-room of one of the sitting members, some one came out, and insisted on the passengers kneeling, or paying obedience to it, which some did. That at another place, the words "IN HOC SIGNO VINCES" were written and affixed to the cross.

Persons were seen being sworn on a wooden cross not to vote for the petitioner. These facts having been elicited from witnesses who had been called to prove bribery, which was another charge contained in the petition, on his proceeding to call the witnesses who were to have established the charge of undue influence by the Roman Catholic priests, the committee interposed to ask, as we have already seen,† 'whether the influence alleged to have been used had been of such a character as, if established, would avoid *the election*, or the particular votes only, supposed to have been influenced?' Mr. Harrison, for the petitioner, answered that the evidence was tendered to prove an undue and improper interference with the freedom of election: that *though he must admit* that the charge could not be established to so great an extent as *to avoid the election*, still he was prepared with evidence of the Roman Catholic priests having used threats to influence voters—and that in one instance, that of a witness already called for that purpose, he had been excommunicated in consequence of having voted for the petitioner. He contended that the committee might receive evidence of this interference with the freedom of election, with the view of making a special report to the House, if they should

turned away from confession, in consequence of the numerous attendance.

* Another priest stated that the one last alluded to in the text, soon after the election became insane.

† Ante, p. 425.

deem it necessary; that it was desirable that the evidence should be brought before them with that view, as, if their determination should be, that the parties must proceed to a new election, this interference would probably *be exerted again*, and to a much greater extent than at the late election. He also cited three cases; to which the committee answered, that each was one where the *seats* might have been affected, which it was admitted could not be the case here: "and with respect to the witness who had been excommunicated, his vote had been given to the petitioner, who should not, therefore, impeach it on the ground of undue influence." They again intimated that it was not competent for them to receive evidence which it was acknowledged could not affect the seats of the sitting members, or the votes of individuals; and finally intimated that on these grounds they did not consider that this part of the case should be proceeded with.—The charge of bribery having failed, the petitioner declined to proceed with the scrutiny; and the sitting members were held to be duly elected.

What might have been the result, had the petitioner's counsel proceeded to call his witnesses to prove the case stated in the petition; had he made no admission that he did not expect to be able to avoid the election; and if the evidence had fairly supported the case stated in the petition? It is submitted that the committee ought to have declared the election void, as one which, in point of law, had been really none at all. To hold the contrary, would be virtually to legalize the proceedings complained of, and annihilate the freedom of election. How could individuals thus 'returned' be regarded as returned "according to the requisition of the writ"—that requisition being, to return those whom the returning officer has "caused to be elected *freely and indifferently*"? * Such a return would be practically a false one.

'The commonwealth† hath *an interest in the service of every particular member of the Commons' House of Parliament*; and this court, and council of state and justice, is guided by peculiar, more high, and politic rules of law and state than the ordinary courts of justice are in matters between party and party The statutes which in the affirmative do inflict any

* See the writ of summons, post, p. 441, A.

† Glanville, *Chippenham* case, 59, 60.

particular penalty or forfeiture against the sheriff or any other, for making a false return to the parliament, are but for a further punishment and terror, *and do not abridge or take away the ancient and natural undoubted privilege and power of the said Commons in parliament*, to examine the validity of elections and returns concerning their House and Assembly, and to cause all undue returns, in that behalf, to be reformed, and to punish the offenders concerning the same, according to justice.' We learn also from the same high authority,* that a committee 'may, and *ought ex officio* to proceed and examine the cause, aye or no,' though the parties had agreed to withdraw it from their cognizance. 'It was holden clearly that they were not to be excluded by the neglect of the parties in not prosecuting their complaint, which peradventure they might desert, by some undisposed combination, to the prejudice of the whole kingdom, which hath an interest in the election of every member; the ill consequences which might follow by *occasion of such as shall then serve without due election* trenching deeply upon the rights and liberties of the commonwealth. Nevertheless the House of Commons, in such case, have their election to examine the matter *ex officio*, or to confirm the return already made at their pleasure, as they see cause in their discretion, for they are a council of state and court of equity, touching things appertaining to their cognizance, as well as a court of law; and they may of themselves question any election or return, although no party grieved do even complain.'

If these be the rights and powers of the House of Commons, it is bound to exercise them on any fitting occasion; and none can more peremptorily challenge them to do so, than that of an election deliberately turned into a mockery, by a systematic intimidation and restraint, which as effectually impair and nullify the exercise of the elective franchise, as systematic corruption.

In such cases as those under consideration, a committee exercises the functions of a judge and a jury, having to deal with both facts and law. Having legally ascertained the former, they are bound to apply to them the latter, as it may exist in a statutory or common law form; and it would be strange, indeed, if it should prove that while invested with powers adequate to minor exigencies, they have none to cope with the greater

* Glanville, *County of Middlesex* case, p. 118.

one of an organized system of intimidation, restraint, and violence; but must retain for an entire parliament one who has been returned to it in violation and defiance of the law of parliament, and who is, therefore, in contemplation of law *no* member of that parliament. If the House of Commons be really so helpless, it will be necessary for the legislature to interpose for the protection of the public in their exercise of one of their most precious and sacred rights. It is conceived, however, that the matters in question are fairly within the jurisdiction of a Select Committee, and require to be only brought properly under their notice, in a petition, and by evidence.*

* It may have been observed, that the petition in the *County of Dublin* case sought throughout to show that the acts complained of were done with the privity and approval, and by the agents and partisans of the sitting members. It is submitted that it was necessary neither to allege nor to prove such to have been the case. Where a conspiracy to corrupt a borough had been formed without the sitting members even knowing of the existence of the conspiracy, and the committee even negatived such knowledge, evidence was nevertheless allowed to be given of the corrupt proceedings, to avoid the election. *Ilchester* case, 1 Peckwell, 302; and so in the *Liverpool* case, Printed Minutes, A.D. 1821. It was decided otherwise, however, in the *Bristol* case, Cockb. & Rowe, 533. But "where elections have been sought to be avoided from riot and intimidation, it has never been held necessary to connect the sitting member, or his agents, with the illegal proceedings." *Nottingham*, 1 Peck. 85; *Coventry*, Cockb. & Rowe, 279; Rog. on Elections, 210, note (a).

CHAPTER XXI.

JURISDICTION OF SELECT COMMITTEES—CONTINUED.

BRIBERY.

THE administration by Select Committees of the statute and parliamentary common law respecting Bribery—and the remark is still more applicable to the subject of Treating, which is discussed in the next chapter—has not been as consistent as could have been desired; but the reasons are obvious, and point to a leading distinction between judicial decisions by Select Committees of the House of Commons, and those by courts of law. Both have to deal with written and unwritten law, and apply them on the same principles, and by the aid of the same rules of evidence, to sworn facts, and after having had the assistance of argument by counsel. Thus far they discharge, in common, the functions of a court of justice. The courts at Westminster regard themselves as courts of only co-ordinate authority, and bound by each other's decisions, however disapproving of those decisions:* but such decisions may be freely challenged by those dissatisfied with them, before a court of error, whose decisions may again be reviewed by the ultimate court of appeal. Thus is secured, to a great extent, uniformity of decision, and consequent certainty and facility in applying the rules of law to facts. The case is widely different with Committees of the House

* Per Parke, B., in *Wagstaffe v. Sharpe*, 3 M. & W. 525. (This was a decision given after great deliberation, in accordance with a decision of the Court of Queen's Bench, with which the Court of Exchequer expressed itself greatly dissatisfied, but bound by it, on the ground assigned in the text.) So, also, in *Barker v. Stead*, 3 C. B. 951, Lord Truro, then Lord Chief Justice of the Common Pleas, in delivering the judgment of the court, said—"The Court of Exchequer having solemnly decided the point, it does not become a court of co-ordinate jurisdiction to entertain a discussion as to the propriety of such decision. That should be left to a court of error. A contrary course would tend to much uncertainty and inconvenience to the public."

of Commons, who have not held themselves thus strictly bound to follow the decisions of previous committees, even when recorded accurately; and, from the nature of the case, when numerous committees are sitting at once, several may be deliberately dealing differently, at the same moment, with the same state of facts; and not only doing this, but applying to them varying rules of parliamentary law. See, for instance, the cases of the *Athlone** [1843] and *Rye*† [1848] elections, in each of which the question was whether the election had been avoided by an insufficient notice of the day of the election. In the former case, by the words of the statute then in force in Ireland (1 Geo. 4, c. 11, s. 5), the notice was to be given “four days *at the least*, preceding the day of the election;” in the latter (3 & 4 Vict. c. 81), is required “three clear days’ notice *at least*, of the day appointed for the election.” In the former case, after full argument, the committee held that the election was *not* invalidated by an irregularity in that respect, if it did not appear that the result of the election had been affected by it; thereby overruling several old authorities. In the latter, the committee held, in almost the identical form of words even, that the election *was* invalidated by an irregularity in that respect, though the sitting member had been the only candidate, and no protest had been made by any electors, till after the election had been finally completed by declaring the sitting member returned! The only practical, and that only partial, remedy for this serious inconvenience, is for committees to adhere as closely as possible to the rules of law in interpreting statutes and other documents, and in the principles regulating the law of evidence; and also to regard as binding, a previous decision of a Select Committee, *on the same state of facts*, unless that decision can be plainly shown to be wrong in point of parliamentary law. To hold otherwise would be a monstrous sin against first principles. If, for instance, as happened in a recent committee,‡ whose decision will be commented upon in a subsequent chapter, it has been decided that the fact of marriage shall not be proved by one who *was present*, even officially taking part in the ceremony; nor by a copy of the register; nor by proof of cohabi-

* Barr. & Arn. 122.

† P. R. & D. 113, 115. In this latter case, the return was admitted by the sitting member’s counsel to be void, apparently without adverting to the *Athlone* case.

‡ *Lancaster* (2nd), P. R. & D. 161.

tation, as man and wife,—it would be absurd and unjust to require future committees to adopt the precedent.

In addition, however, to the advantages above attributed to the courts of law, they possess another—in their habit of assigning publicly, as they are bound always to assign, *the reasons* on which their judgments are founded. “The parties to a cause,” said the late Mr. Baron Bayley, “are *entitled* to be satisfied by knowing the opinion of each judge, *and the grounds on which it is founded.*”* Litigants are thus enabled at once to judge as to the expediency of challenging the propriety of a decision so pronounced. It is, however, otherwise with Select Committees, whose determination, too, is final between the parties, to all intents and purposes.”† In a former part of this work‡ is pointed out one signal anomaly in our parliamentary jurisprudence, connected with the particular subject now under consideration: that it is sometimes necessary *to adduce evidence*, in order to show which, out of many alleged in the petition, were the particular grounds of a parliamentary decision—viz. that it had proceeded on one of several charges,—that of bribery:—and this, for the purpose of giving to that decision the effect of a *quasi* parliamentary attainder.§ These inconveniences have long been felt most severely in cases of bribery and treating. “Bribery,” said Lord Glenbervie, in continuing his elaborate note on the subject, appended to his report of the case of *Saint Ives*,|| “is one of the most important titles in the Law of Elections. It is to be regretted that the nature of the cases where questions of bribery arise, and are litigated by counsel, is such that it is for the most part impossible to deduce from the determination of the committee, what their opinion was upon those particular questions.” Mr. Orme, also, in the year 1812, thus spoke of the decisions of Election Committees on these subjects. “Few of these decisions will serve as precedents, in future cases. This may be considered to arise from two causes: first, from committees not having expressly decided on any

* *Young v. Timmins*, 1 Tyrwh. 238.

† 11 & 12 Vict. c. 98, s. 86, ante, p. 285.

‡ Ante, p. 182; Rogers on Elections, p. 75; and, *arguendo*, *Second Newcastle-under Lyne*, Barr. & Aust. 573.

§ “The simple resolution of ‘a void election,’” says Mr. Luders, in a note, in reporting the case of *Ipswich*, 1 Lud. 69, “has no reference to the evidence in the cause.”

|| 2 Doug. Elect. Cas. 399—419.

specific objection, although in most cases the petitions have contained several charges, either of which would, if proved, have been sufficient to have avoided the election, or to disqualify the member accused ; and, secondly, from cases of this nature being seldom alike, nearly every case affording a new mode of creating influence by money, or money's worth, but still attempting to evade the operation of the laws against bribery and treating. It is, therefore, probable that what acts do or do not amount to bribery, or to treating, will continue to remain in the same undecided state, and (until some legislative provisions are made) committees will continue to act and decide upon the particular circumstances of each case, as they are made out in evidence before them.”*

If, however, there be some uncertainty floating over the question as to what particular facts will be adjudged by a committee to amount to bribery,—though they have, in one way or another, had to deal with well-nigh every imaginable combination of facts, thereby, it were to be hoped, exhausting the ingenuity of those resorting to corrupt practices—that uncertainty has one advantage : that it alarms and deters intending offenders, who might otherwise continue to evade *very precisely-defined* offences.

That bribery, and the attempt to commit it, are COMMON LAW offences, is indisputable, and will presently be proved conclusively. In former portions of this work, especially in the chapter devoted to that subject,† may be seen many instances of cases of adjudged bribery, by courts of law and Select Committees, which are themselves sworn courts of law bound to give their judgment according to the evidence. There, also, is exhibited a faithful outline of the law of bribery, as Select Committees are at the present day bound to administer it, in conformity with the existing statute and common law. That law must be rigorously administered on the principle laid down by Baron Bayley in dealing with a case of debt for penalties under the Bribery Act.‡ “It is not for us to say what might be politically desirable, but what is the provision of the legislature ; and in order to answer that question, we must resort to the established rules for construing acts of this nature.” In

* Orme on Elections, 300.

† Chapter XII., ante, p. 240 ; see also, pp. 162, 163 ; 182, 183.

‡ *Lord Huntingtower v. Gardiner*, 1 B. & C. 299.

the same case, Mr. Justice Best, in delivering judgment, observed, “I cannot but feel strongly the mischief arising from bribery at elections, and should be therefore willing to go as far as possible, in order to suppress it. We must, however, take care that we do not with that view transgress the law.”*

Whatever acts are, or may now be held, to constitute bribery, it has been made the subject of repeated and also, especially of late years, severe, searching, and effective legislation; as may be seen in the twelfth chapter of this work. When *once ascertained to exist*, the mode of dealing with it is now pretty well ascertained and defined, from the extinction of a particular vote up to the extinction of an entire constituency,—from a delinquent voter, to a delinquent borough†—corrupted by general, long-continued, and systematic bribery: the former being by the common law of parliament, as has been already explained,‡ the latter by the sweeping statute passed towards the close of the last session of the parliament dissolved in 1852.§ Both are founded on one and the same principle—and that only a corollary, as Sir John Simeon observes, flowing from one great maxim, “that *elections should be free*: upon the preservation of this vital principle depends not only the prosperity, but the very existence, of the state, AS A FREE STATE.”||

The key to the whole doctrine of bribery is, the giving or withholding any one, or any number of votes, *under corrupt influence*: and wherever its existence is clearly detected, it will be dealt with temporarily, or permanently, according to its malignity, in the case of individuals, or constituencies. Independently of the positive statutes against bribery, whenever a person is returned in consequence of an undue influence acquired by that means, his *election* is void; and every *vote* purchased by bribery, is also void,—the person who gave it under such influence, being to be considered as if he had not voted at all.¶ Lord Mansfield stated that “bribery at elections of members of parliament must ALWAYS have been a

* *Lord Huntingtower v. Gardiner*, 1 B. & C. 303.

† Hansard, cxxii. (3rd Series), 566, 14th June, 1852.

‡ Ante, p. 375.

§ Stat. 15 & 16 Vict. c. 57, ante, 252, et seq.; post, p. 362, A.

|| Simeon on Elections, pp. 209, 210.

¶ 2 Dougl. Elect. Cas. 403. In the case of *Stockbridge*, on the 15th of November, 1689, the election was avoided on the ground of bribery. — Journals, vol. x. p. 287, cols. 1, 2.

crime at common law, and punishable by indictment, or information :''* but Lord Glenbervie† observes, that he believed there were no traces of any action or prosecution for *that* kind of bribery, in the annals of Westminster Hall, till after the legislature had thought proper to inflict particular penalties upon it by the statute to which, amongst others, the reader's special attention will be immediately directed. That important statute is the 2 Geo. 2, c. 24, passed in the year 1729;‡ and its *essential* provisions, with light reflected upon them by the statutes passed respectively in the years 1809, 1841, and 1842, will presently be stated *in extenso*, as far as at present concerns the jurisdiction of a Select Committee, though incidentally.

Before, however, proceeding to explain the structure and operation of the last-mentioned act, it may be instructive to consider the *Evesham*§ case,—the decision of a committee, of which that able election lawyer the late Sir Robert Peel was chairman. The first and main question to be decided was one respecting a charge against the sitting member, of personal bribery—the gift of a silver snuff-box, with his crest engraved on it, of the value of 7*l.* 5*s.* 6*d.*, sent by him to an attorney at Evesham, in his interest, a fortnight before the election, which occurred on the 25th July, 1837: and who delivered it to the voter, with the sitting member's compliments, on the 14th July. The sitting member subsequently canvassed the voter three or four times. These facts were proved by the voter himself; who also stated that he did not vote at all, at the election. In arguing against the vote, reliance was placed on the resolution of the House of Commons of the 2nd April, 1677,|| made a standing order on the 21st October, 1678,¶ within the very words of which [i. e. “a *present*, given”] the case, as established, undoubtedly came. Sir Robert Peel said, “the committee wished to have the following question argued—whether the resolution of the 2nd April, 1677, *having been passed previously to the Bribery Act*, had now the force of law?” It was, accordingly, argued that the resolution had been turned into stat. 7 Will. 3,

* *Rex v. Pitt*, 3 Burr. 1338.

† 2 Dougl. 400.

‡ Ante, p. 248; post, 188, A.

§ *Evesham*, F. & F. 504. N. B. The author was present on the occasion, and never saw a judicial president exhibit greater patience, suavity, and dignity, than did Sir Robert Peel, as Chairman of the Committee.

|| Given partly, ante, p. 263.

¶ See it at length, in Orme on Elections, p. 293, and 2 Dougl. 404, 405.

c. 4, * and thereby superseded; that a resolution of the House can make no new, nor add to the old, law, but simply declare the old, as collected from custom and usage; and that, by making the resolution in question the foundation of a statute, the former had been virtually annulled. It was answered, that the resolution was only declaratory of the common law, which was still in force, as proved by the case of Thomas Long, in the *Westbury* case (4th Inst. 23), who was convicted by the House of bribery, when no statute against bribery was in force.† As the resolution thus merely expressed the common law, the subsequent statutes of 7 Will. 3, c. 4, 2 Geo. 2, c. 24, and 49 Geo. 3, c. 118, were merely *cumulative* upon that resolution. After hearing Mr. Austin's reply, the chairman announced as the resolution of the committee—

“That the committee *must look to the statute law*, and not to the resolution of the House of Commons of 1677, FOR THE DEFINITION OF THE OFFENCE OF BRIBERY;”‡ and ultimately passed their resolution, “which,” they declared, “was *not* founded on the resolution of 1677.”§

The first of the three statutes referred to in the argument of the *Evesham* case, viz. the 7 Will. 3, c. 4 [A.D. 1695], commonly passes under the name of “The *Treating* Act,” both in courts of law and in parliament: but its provisions will be found also pointed distinctly at bribery, as was correctly stated in the argument of the second *Newcastle-under-Lyne* case.|| That declaratory act undoubtedly recites, as a prominent object of passing it, the securing elections to be “freely and indifferently made, *without charge or expense* ;” but its provisions embrace, in the clearest possible language, both *treating* and *bribery*, each of which it prohibits: the former, under the words “*meat, drink, entertainment, provision*,”—the latter, under the words “MONEY, PRESENT, GIFT, REWARD:”—as to which it “DECLARES and enacts” thus: that “no person”—not specifying in terms any distinction between bribery by the member himself, or by his agent—“after the *teste* of the writ, &c., shall,

* Post, p. 171, A.

† The latter fact was elicited by a question of Sir Robert Peel. See also *Rex v. Pitt*, 3 Burr. 1838.

‡ The committee held that the act of bribery had been proved; and seated the petitioner in the place of the sitting member, after the former had placed himself in a majority on a scrutiny, pp. 536, 537.

§ Pages 536, 537.

|| Barr. & Aust. 575.

by himself, or by any other ways or means on his behalf, or at his or their charge, before his election, directly or indirectly, give or present to any person having voice or vote in such election, any *money*, or make any *present*, *gift*, *reward*, or make any promise, agreement, obligation or engagement to give any *money*, *present*, *reward* to or for any such person in particular, or to any such county or place in general, or to or for the use, advantage, benefit, employment, profit, or preferment of any such person or place *in order to be elected*, or *for being elected*, to serve in parliament for such county or place: and that every person so giving, presenting making, promising, engaging, doing, acting, or proceeding shall be and is hereby DECLARED and enacted, disabled and incapacitated, upon such election, to serve in parliament for such county or place and deemed or taken, and is thereby DECLARED and enacted to be deemed and taken no member in parliament; and shall not act, sit, or have any vote or place in parliament, but shall be, and is thereby DECLARED and enacted to be, to all intents, constructions, and purposes, as if he had been never returned or elected [a] member for the parliament.”* It is to be observed, as will presently be shown at length, that this act is thus one profess- edly declaratory† of “what,” in the language of Blackstone, cited below, “THE COMMON LAW IS, and ever hath been:” therefore conclusively showing, had it been wanting, that, directly or indirectly, to give money, present, or reward, in order to be elected, or for being elected, to serve in parliament, was then a common law offence; and that whoever did so was, by common law, disabled and incapacitated to serve for that place, and was, in point of law, no member, nor ever had been, by virtue of an election and return so obtained. The act also, in like manner, deals with the giving, presenting, allowing, or promising “meat, drink, provision, or entertain- ment;” and in construing the act, in the case of *Hughes v. Marshall and others*,‡ Lord Lyndhurst stated expressly, that

* Sects. 1, 2.

† ‘Statutes are *declaratory*, where *the old custom of the kingdom* is almost fallen into disuse or become disputable; in which case the parliament has thought proper, *in perpetuum rei testimonium*, and for avoiding all doubts and difficulties, to declare what the common law is, and ever hath been.’—1 Bla. Comm. 85, 86.

‡ 2 Tyrwh. 134; S. C. 2 C. & J. 120; ante, p. 266.

“if the refreshments were provided for the purpose of procuring an election, that constituted the offence of bribery at common law.” And finally, the last section of stat. 5 & 6 Vict. c. 102 (s. 22),* is confined to ‘extending’ these ‘provisions’ of stat. 7 Will. 3, c. 4, against ‘charges and expenses in elections,’ which had been found ‘insufficient to prevent corrupt TREATING;’ and relates exclusively to “*meat, drink, entertainment, or provision,*”—the two sections next preceding it, (ss. 20, 21,) to “BRIBERY” only.

Having thus authentically ascertained, and authoritatively determined, by the lips of the legislature itself, in the year 1695, what was then the *common law* respecting bribery, and its parliamentary effect upon one guilty of it, viz. to nullify election returns obtained by its means, let us pass on to the year 1729; in which was passed the important statute 2 Geo. 2, c. 24.

It recites that it had been found by experience, that *the laws already* in being, had not been found sufficient to prevent CORRUPT and ILLEGAL practices in the election of members to serve in parliament; and proceeds, “for remedy therefore of so great an evil, and to the end that all elections of members to parliament may hereafter be FREELY and INDIFFERENTLY made without charge or expense” (adopting the language of stat. 7 Will. 3, c. 4), to enact, that any elector may be required to take the searching oath there prescribed, against bribery, before being admitted to poll. The leading section, however, with which we have to deal, is the seventh; and its substance, *stripped of various stringent expressions*, may be stated as follows, in the words of the act:—

If any person HAVING, or CLAIMING to have any right to VOTE in any election of any member to serve in Parliament,
 shall ASK, RECEIVE, or TAKE,
 by way of gift, loan, or other device,
 any MONEY, or OTHER REWARD,
 or AGREE, or contract
 for any MONEY, GIFT, OFFICE, EMPLOYMENT, or *other reward* whatsoever,
 to GIVE, REFUSE, or FORBEAR to give his vote in any such election;
 or,
 if any person, by himself,

* Post, 274, A.

or any person EMPLOYED by him,
shall, by any GIFT or REWARD,
or by any *promise, agreement, or security* for any GIFT or
REWARD,

CORRUPT, OR PROCURE,

any person to GIVE, or FORBEAR to give his vote in any
such election :—

each of such persons so offending, shall forfeit FIVE HUNDRED
POUNDS for every such offence ; and,

from and after JUDGMENT obtained against him, in any ac-
tion of debt, information, summary action or prosecution,
or being any otherwise lawfully CONVICTED thereof,
shall FOR EVER be disabled TO VOTE in any election of any
member to Parliament.

Such are the formidable consequences annexed by this act to
the violation, by a single act of parliamentary bribery, of the
common law which had been so recently *declared* by the statute
law. The ensuing section (s. 8) of stat. 2 Geo. 2, c. 24, however,
discharges from all these consequences any person who may
not have been before convicted of the offence entailing them,
provided *within twelve months* after the election, he discover
any other offender, so that *he* be convicted.

When it was said that two subsequent statutes reflected light
on the foregoing one, the first thus alluded to was stat. 49
Geo. 3, c. 118 ; which, reciting that the stat. 2 Geo. 2, c. 24,
s. 7, was confined to the case of gifts and promises made to a
person having, or claiming to have *a vote*, proceeds, as will be
seen, to extend its severe enactments to the case of ‘ *any person,*’
making the gifts or promises which it specifies to ‘ *any person,*’
to procure the return of ‘ *any person.*’ *

This statute † (stripping it, for brevity’s sake, of many strin-
gent expressions) DECLARES and enacts, (s. 1), substantially—

(I.) That if ANY PERSON, by himself, or,
by any other person, FOR, or ON HIS BEHALF,
GIVE, or CAUSE TO BE GIVEN, directly or indirectly,
or PROMISE or AGREE to give,
any MONEY, GIFT, or REWARD,
to ANY PERSON,
on any *engagement, contract, or agreement,*

* Ante, pp. 248, 249 ; post, 211, A.

† Ante, p. 251.

that such person shall, by himself or any other person *at his solicitation*, request, or command, procure, OR ENDEAVOUR to procure the return of ANY PERSON to serve in Parliament for any county, borough, or place:—

every person so having *given*, or *promised* to give, shall, *if not himself returned to Parliament*, for *every* such GIFT, or PROMISE, forfeit ONE THOUSAND POUNDS.

And every *such* person *so returned*, and so having given, or promised, or KNOWING OF AND CONSENTING TO such gifts or promises upon any such engagement, contract, or agreement, is thereby declared DISABLED and INCAPACITATED to serve IN THAT PARLIAMENT for such county, &c., borough or place, and shall be deemed and taken and is DECLARED and enacted to be no member of Parliament, and to all intents, constructions, and purposes, *as if he had never been* returned or elected.

II. And ANY PERSON who shall RECEIVE OR ACCEPT OF, by himself, or any other person in trust for, or to his use, or on his behalf, any such MONEY, GIFT, or REWARD, or any such PROMISE, on any such engagement, contract, or agreement, shall forfeit the value and amount of such money, gift, or reward, OVER AND ABOVE the sum of FIVE HUNDRED POUNDS.

By the 3rd section,

If ANY PERSON shall, by himself, or any other person for or on his behalf,

(I.) GIVE or PROCURE to be given, or promise to give or procure to be given, ANY OFFICE, PLACE, or EMPLOYMENT, to ANY PERSON, on an EXPRESS contract or agreement that such person shall by himself, or any other person, at his solicitation, request, or command, procure, OR ENDEAVOUR to procure the return of ANY PERSON to serve in Parliament, such person, *so returned*,

and so having given, or procured to be given,
or so having *promised* to give, or procured to be given,
or **KNOWING OF AND CONSENTING TO** such gift or promise, on any such express contract or agreement,
is thereby declared **DISABLED AND INCAPACITATED** to serve
IN THAT PARLIAMENT, for such county, &c., borough,
or place,
and deemed and taken and is declared to be no member of
Parliament, and to be, to all intents, constructions, and
purposes, *as if he never had been returned or elected*.

(II.) And **ANY PERSON** who shall **RECEIVE OR ACCEPT** of,
by himself or any other person in trust for, or to his use,
or on his behalf,
any such **OFFICE, PLACE, OR EMPLOYMENT**,
on such *express contract or agreement*,
shall **FORFEIT** such office, place, or employment,
and be **INCAPACITATED FOR HOLDING** the same,
and shall forfeit the sum of five hundred pounds.

(III.) And *any person* holding **ANY OFFICE under his Majesty**,
who shall **GIVE** such office, appointment, or place,
upon any such **EXPRESS contract or agreement**,
that the person to whom, or for whose use such office, appointment, or place shall have been given, shall so procure or endeavour to procure the return of **ANY PERSON** to serve in Parliament,
shall forfeit the sum of **ONE THOUSAND POUNDS**.

The last of these three sweeping statutes is the 5 & 6 Vict. c. 102, s. 20, already glanced at in a previous page,* which struck at the roots of extensive, systematic, long standing, and even *quasi-legalized* electoral corruption.

Whereas **A PRACTICE** has prevailed in certain boroughs and places, of making **PAYMENTS BY OR ON BEHALF OF CANDIDATES TO THE VOTERS**,
in *such manner*, that *doubts* have been entertained, whether such payments are to be deemed **BRIBERY**,—

Be it **DECLARED** and enacted,

That the *payment* or *gift* of any sum of **MONEY OR OTHER** valuable consideration,

* Ante, p. 425.

to ANY VOTER,
 BEFORE, DURING, OR AFTER any election,
 or to any person on his behalf, or,
to any person related to him by kindred or affinity,
 and which shall be so paid or given,
on account of such voter having *voted*, or having *refrained*
 from voting,
 or being *about* to vote, or refrain from voting, at the
 election,
 whether the same shall have been *paid* or *given*,
 under the name of HEAD MONEY, or ANY OTHER NAME
 WHATSOEVER,
 and whether such payment shall or shall not have been in
 compliance with any USAGE or PRACTICE,
 shall be deemed BRIBERY.

On this last act being put in force, the year after it had been made, in the case of 'headmoney' given by the agents of a sitting member, to about *one hundred voters*, after the election, it was attempted to obviate the effect of the act, by strenuously urging the absence of any proof of such previous corrupt *agreement*, as had been averred in the petition, or of any distinct contracts for such payments. The committee, however, properly held such proof needless; the admitted facts having brought the case within the words of the act, which declared the mere payment, or gift of the money, under the circumstances, to have been bribery.* This case was very ingeniously argued; but it appears impossible to withstand the argument against the sitting member, that the act was a declaratory one, clearing up doubts which had been entertained whether a practice prevalent in certain boroughs, of making payments by or on behalf of candidates to the voters, was to be deemed bribery;—and that the act most explicitly declared *to be bribery* the payment of any money to any voter, before, during, or after any election, on account of his having voted or refrained from voting, or being about to do so—whether paid under the name of head-money, or any other; and whether the payment was or was not in compliance with any usage or practice. The act did not alter, but merely 'declared' the law, and said nothing about any previous promise: for no "doubt" could ever have been entertained as to a *subsequent* payment, in pursuance of a *previous*

* *Durham, Barr. & Arn.* 213.

promise, being bribery. An elector who had received such promise would be perjured if he afterwards took the bribery oath. The section must therefore necessarily apply to a payment *after* the election, without either the fact, or the proof of any previous promise. If these payments were bribery, they avoided the seat; and so the committee decided, absolving, however, the sitting member from any cognizance of the acts declared to have been bribery.

The reason of here citing this case, is to draw attention to the sound *principle* on which the legislature has proceeded, viz. in aiming at the extirpation of that corrupt influence which annihilates the freedom and indifference with which the franchise should be exercised. If a *practice* prevail, by which voters expect payment from candidates after an election, how is it possible that such voters can have voted with a "*free and indifferent*" mind?

Having thus ascertained what is bribery, by common law, and as declared, and greatly extended and strengthened by the statute law, let us endeavour, from both combined, to deduce a comprehensive definition of parliamentary bribery, on the part of A VOTER.

It is,—*the asking, taking, or receiving, before, at, or during an election of a member to serve in parliament, any money, valuable consideration, office, place, employment, or other reward (whether by way of gift, loan, or other device), or any promise of such, in order to vote, or refuse or forbear to vote, or for having voted, refused, or forborne to vote at such election.*

This sentence contains all the essential elements of the offence on the part of the voter. Any one of them suffices to corrupt his mind, so as to disable it from giving a free and indifferent vote, in obedience to the writ of summons. And it is on this ground that the legislature has wisely attached such disabling and penal consequences to the ASKING for a bribe: the mere soliciting it infallibly indicates a corrupted mind. It will, however, be seen, in due time, that this is otherwise in the case of the other party to the transaction: for the legislature has not constituted the corrupt asking, *merely*, for a vote, an act of bribery, but actual corruption, or procuring, by *an offer accepted*, or a vote actually obtained by such means. This distinction will be found to apply equally to the case of a brother voter, and a candidate; and is the solemn judicial interpreta-

tion by the courts of law, of the language of the seventh section of the statute.

Such being, in point of *law*, bribery, the rest is a question of *fact*, depending upon acts and intentions, as established *by evidence*: and these matters, of both law and fact, the Select Committee determine in the double capacity of judges, and jurymen.*

The first direct application, by a committee, of the bribery laws, is that which has been already partially disposed of,—namely, the individual case of the voter who had been bribed, and thereby his electoral voice silenced, as far as regards its efficacy, on the occasion on which it was given; and whose case is brought before a Select Committee on a scrutiny, by an allegation in the PETITION, which may be substantially in the following form:—

“ That divers persons voted at the election for [the sitting
“ member], and were reckoned upon the poll in his favour,
“ who had been bribed to vote at the said election in his
“ favour, or to forbear to vote for [the petitioner], and
“ that the votes of such persons were therefore bad, illegal,
“ and invalid, and ought to be struck off the poll.”

The corresponding entry in the LIST OF OBJECTIONS, may be thus:—

“ The vote of each party included in this class, is objected to,
“ For that each did *ask, receive, or take*, money or other
“ reward, by way of gift, loan, or other device,—or agreed
“ or contracted for money, gift, office, employment, or
“ other reward,—to give his vote, or to refuse or forbear to
“ give his vote at the said election; and for that each of
“ the said parties was bribed at the said election; and for
“ that each of the said parties was corruptly influenced to
“ give his vote at the said election for the said sitting
“ member.”

It is to be observed, that no *statute* extinguishes the suffrage, except in the case of the voter, as well as the corrupter, being “FOR EVER” silenced, after judgment and conviction in a court of law, in obedience to stat. 2 Geo. 2, c. 24, s. 7. As already explained, the simple extinction of the bribed vote, on the particular occasion on which it was given, is effected by the common law of Parliament; but the legislature may think proper to act upon such a finding of the House of Commons, through

* See 1 Dougl. Introd. p. 21.

one of its Select Committees specifying names, by special resolution of the House; and as though it were by a bill of parliamentary attainder, declare those individuals thenceforth incapacitated and disabled from giving any vote at any election of members for Parliament.* The annulling, by a Special Committee, of a bribed vote, is not an act, in point of law, professedly of *punishment*, but simply a declaration that the faulty vote had had no effect *as* one, and must be treated, as far as regards its efficacy on the poll, as though it had never been given. Such a particular decision affects, however, only the particular election respecting which it was pronounced: and if another take place without the voter's being in the mean time duly *convicted* of bribery by a court of law, 'he stands in the same situation as any other elector, and is entitled to the same rights:' for it cannot be pretended that the bare resolution of a committee amounts to a '*lawful conviction*' within stat. 2 Geo. 4, c. 24, s. 7—'a highly penal clause which must be construed strictly.'† Even a court of law, said Mr. Justice Best, in construing that section, 'ought not to pronounce a judgment imposing very severe penalties, unless the offence come within the letter of the act, whatever might have been the intention of the legislature in passing it.' In the *Ilchester* case‡ it was held, after deliberate discussion, that the fact of bribery at a former election, did not *ipso facto* disqualify the 'voter from voting' at an ensuing election. "We have decided the question," said the committee, "on general principles; and we cannot try the merits of the former election." To act otherwise, indeed, would be to usurp legislative powers; and that, too, for the severest penal purposes, and derogating from the liberties of the subject.

With a view to determine whether a vote proposed for scrutiny has or has not been freely and indifferently given, be it ever remembered that it is *the state of the voter's mind at the time of giving the vote*, which is before the committee; and as they cannot dive into his motives,—conduct, acts, and declarations must indicate intention. *Acta exteriora indicant secreta interiora.*||

The case of *Baker v. Rusk*,§ recently decided, after time

* Vide ante, p. 163, stat. 11 Geo. 3, c. 55, by which sixty-eight persons were thus dealt with, in the borough of New Shoreham.

† Per Best, J., *Lord Huntingtower v. Gardiner*, 1 B. & C. 304.

‡ 2 Peck. 245 et seq.

§ 6 Rep. 291.

|| 15 Q. B. 874, 877; ante, p. 256.

taken to consider the judgment, while throwing additional light on the stat. 2 Geo. 2, c. 24, s. 7, also illustrates the proposition here enunciated. The case was one of an action of debt, for the penalty of 500*l.* under s. 7, against the defendant for corrupting a voter to vote at the Harwich election, which took place on the 29th July, 1847. The act of corruption was, promising the voter to pay a creditor of his a sum of money (in order to redeem a boat of the voter), provided the latter would vote for a particular candidate, for whom the defendant was agent. The voter declined to promise: but the money was ultimately paid, the boat released, and the voter gave his vote for the candidate in question, but it did not appear that he had ever *promised* to do so.—The court held that the offence of the corruption “was complete, when the voter had agreed, or appeared to agree to the bribe, though nothing further should have been done.” After discussing the particular circumstances of the case, the court proceeded—

“It is plain that the statement of the payment of 10*l.* does not accurately describe *the motive operating on the voter's mind*, to promise his vote. *That motive* obviously was, the releasing of his boat, by payment of the whole amount for which it was pledged The *motive* of the defendant, the alleged corruptor, was to obtain the promise of the voter's vote; and he *did* obtain it, by payment of 10*l.* and promising other payments.—This is not like a case of soliciting another to do an act which is in itself an offence: there the means of solicitation are wholly immaterial; *the soliciting* itself, by whatever means, is a misdemeanor. Here the promise to vote for the candidate, or the actual voting for him, is no offence; nor is the bare fact of soliciting the voter to vote for him any offence: the offence consists in *corrupting*, which depends entirely on the means used in soliciting. The payment of 10*l.* was undoubtedly corruption; and that being proved, it may well be urged that, so far as the defendant (the corruptor) is concerned, it is immaterial whether he promised more.”

How, then, is the state of the voter's mind to be ascertained? By scrutinizing his own sayings, doings, and even demeanour, with reference to proved facts legitimately brought forward to affect him: it being, however, borne in mind that it is equally injurious and *illegal* to act upon mere suspicion, in order to rebut the presumption of innocence: and every fair presumption must be made *in favour* of a vote.—The inquiry will be—had the

voter actually received any *quid pro quo* for the discharge of a duty, or the exercise of a right which ought to be gratuitous, voluntary, and conscientious? Had he received the promise of any such? Had he asked for it, or entered into any agreement for it? Did he act under "a corrupt expectation," to adopt the significant expressions of the *Dublin* committee? Did he receive, or was he to receive, or did he stipulate, or expect, or understand that he was to receive any such, either before, or during, or after the election, as the purchase of his vote? If he did, his mind had become corrupt and unable to exercise the franchise; and it is for those asserting such to be the case, to lay before the committee those facts which will induce it, acting as a jury, to draw the proper inference as to the state of the voter's mind. The colours and devices for concealing and disguising bribery have long become tarnished by use; and practised eyes detect in a moment that which is hidden under them.

The *time*, as we have seen, when corrupt gifts of money, or other valuable considerations, are made, is no longer material: the voter is fenced in on every side against the corruptor's approach—whether before, during, or after the contest: and against the *guise* in which he may come,—whether as paying for services rendered, or to be rendered; travelling, or other illusory expenses; compensation for loss of time; wagers—in short, whatever the guilty parties may *call* things, a committee will judge for themselves, from the situation, acts, and conduct of the parties. To such committee it is totally immaterial, in deciding on the validity of the vote, from what quarter the corruption may be aimed at the voter. Thus, in the recent [A. D. 1848] *Lyme Regis*† case, it having been proved that a neighbouring resident gentleman had been in the habit, for the purpose of acquiring political influence in the borough, of lending money to voters, on the understanding that when an election came they would support his party—all such votes were struck off, though the committee had decided that such third person was *not* proved to have been the agent of the candidate for whom the votes had been given. The resolution stated that the votes were struck off, "it having been proved that they had received money upon loan for the purpose of influencing their votes:"—and another (all of them being reported to the House), stated

* F. & F. 204, 205.

† P. R. & D. 38.

that “such transactions operate as a grievous snare to the voter, and totally destroy *all freedom of election*.” This case strongly illustrates the proposition already more than once laid down, that committees look to the operation of what is done, *upon the voter’s mind*, let it be done how, when, where, and by whom it may, when the question is, whether the vote ought to be struck off, as having been the result of corrupt influence.

And again, the same principle enables us to see the propriety of those provisions of the common and of the recent statute law, which affect the voter by corrupt practices virtually with himself, but nominally and ostensibly with others,—as his relatives, connexions, or friends: every one of whom is then regarded, in the eye of the law, as himself, unless the contrary can be shown by clear evidence. Were this otherwise, the bribery laws would instantly become a dead letter.

But how can these considerations apply to the case of one who cannot be proved, and is not really believed by any one, to have been, or be capable of being, *himself* bribed? The mere fact of his committing the flagrant offence of bribery, or even attempting to bribe another, cannot surely supply the place of that proof without which a committee cannot lawfully act. The attempt was made in the *Coventry and Bridgewater* cases, in the year 1803,* to impugn votes given by those who had offered bribes, and it failed. It was argued in the former case, that as a candidate, returned by a large majority of electors, if he can be shown to have corrupted *any one*† of them, loses his seat; since it may be *inferred*, from what is *proved* in one instance, that he has been similarly guilty in other instances, and by such means obtained his election;—so it may be presumed that an elector, endeavouring to procure votes by means of bribery, is himself acted upon by the same corrupt influence, which he exercises. It is impossible to say that the vote of a man, in such circumstances, is a free suffrage; and if it be not free, it is void. He who gives, is equally guilty with him who takes, a bribe: the same disabilities attach to the same crime, whatever shape it assumes, under whatever circumstances it was committed: and the consequence must be, in all cases, the destruction of a vote given under such influence. These reasonings, however, did not prevail with the committee

* 1 Peck. pp. 97, 102.

† Simeon, 197 (*Accord.*)

who “decided in favour of the voter, without hearing the counsel for the sitting member: probably,” continues the very learned reporter, “on this ground: that though such an *offer* is doubtless a great misdemeanour, it *has never yet* been held to infer a disability to vote.” The *Bridgewater* committee came to a similar resolution: “that voters offering bribes to other voters, by that act were not disqualified from voting.” The mere unaccepted *offer* of a bribe, it has been already stated, does not constitute bribery, under stat. 2 Geo. 2, c. 24, s. 7, as judicially determined in the case of *Henslow v. Fawcett*.* From the absence of the word “ask,” in speaking of the person *corrupting* the other, it is held that “something more is requisite, in the case of the briber, than the mere *offer* of a bribe;” † but the *voter's* offence is complete, if he merely “ask” for a bribe.

Lord Glenbervie puts this question, as one of six, in his note to the *St. Ives* case.‡ “If an elector be proved to have acted as an agent in bribing other electors, but there is no proof that he himself was bribed, is his vote a good one, or void?—Those, “he continues,” who argue that it is void, say that the acting as an agent in bribing others, is such an infringement of the freedom of election, that the law will *presume* that such an agent was as little scrupulous with regard to himself, as he had been with regard to others.”—In the *Ipswich* case,§ it was proposed to strike off the vote of one Arthur Bott Cooke, “because he had given a bribe.” It was said, in answer, that the giving a bribe would not vitiate the vote of the party giving it: and after argument, none of which is given in the brief report of the case, it was resolved “that Arthur Bott Cooke’s vote be struck off the poll, on the ground of his having been guilty of bribing a voter.” This case, as well as those of *Coventry* and *Bridgewater*, and the foregoing passage from Lord Glenbervie’s Reports, were cited in the subsequent *Youghal* case.|| In answer to *Cooke’s* case, counsel stated that it was *the only decision* against retaining the vote thus objected to; but had been decided under

* Ante, p. 256.

† Per Patteson, J., *Henslow v. Fawcett*, 3 Ad. & Ell. 51. “If there be an apparent *agreement*, on the other hand, it matters nothing, whether or not the party [voter] actually gives or intends to give his vote in pursuance of the agreement.”—“I certainly think,” said Baron Parke, “that that is the correct doctrine.” *Harding v. Stokes*, 2 M. & W. 235.

‡ 2 Doug. 417.

§ K. & O. 387 [A. D. 1835].

|| F. & F. 408—416 [1838].

very peculiar circumstances. Cooke had absconded; there might have been evidence that he had himself been bribed; and from his own conduct it was presumable that he might have been bribed. The committee entertained the objection, but the facts failed. On another similar case, however, being called on, the committee announced their resolution that, “on reconsideration of all the circumstances of the case, that class”—i. e. of those who had bribed others—“ought *not* further to be proceeded with.”

It has been already asked, in a preceding chapter, whether, if this doctrine is to be upheld, there is to be any distinction between a vote given before, and one given after, the act of the voter bribing another? In the former case, how is a committee empowered to adopt such an *ex post facto* proceeding? Especially in the case so likely to occur, of an honourable voter voting honourably, before even entertaining the idea of inducing a fellow voter to act dishonourably,—and which had occurred to him in an unfortunate moment of sudden political excitement, causing a brief oblivion of his sense of rectitude. And in the case of his not recording his own vote till after the wrongful act,—that vote a long-since promised and conscientious one,—why may it not be as pure as though he had never done that wrongful act in respect of another?

It is singular that that excellent writer on election law, Mr. Rogers, should have entirely passed over the question proposed on this subject, as above, by Lord Glenbervie, though specially noticing three of the others: all of which he answers in conformity with the principles laid down in the text.* *First*, if an elector be bribed to vote for one candidate, and votes for another on whose behalf he has received no bribe, is this latter gratuitous vote a good one? Mr. Rogers concurs with the questioner in holding the vote good: saying, ‘supposing the vote ultimately given to have been *free from corrupt motive*, the fact that its giver had cheated the man who gave it to him, however dishonourable and dishonest, seems not to amount to *corrupt voting*.’ He adds, that the point was raised in *Coxon’s* case;† but that as his name does not appear in the list of bribed voters, it is presumed that the committee held the vote, so given, to be good. *Secondly*. Suppose A. and B. to be two candidates. C., a voter, takes a bribe to vote for A.; and votes for him, and

* Law of Elections, p. 251, note (a).

† Nottingham, Barr. & Arn. 166 [A. D. 1843].

also for B.—is his latter vote good? ‘A man,’ says Mr. Rogers, ‘may determine to give one of his votes freely, though willing to sell the other: or so he may stipulate with his corrupter at the time of the bargaining for his vote. He may have yielded to temptation with regard to one vote, but resisted it with regard to the other. It is difficult to see, in such a case, on what principle the latter vote could be considered bad.’ *Lastly.* A voter is bribed to give his own vote, and also procure those of others: and by simply exercising over them a legitimate persuasion and influence, without any approach to corruption, procures their votes:—are they good, or bad? ‘It is difficult,’ says Mr. Rogers, ‘to understand how the taint attaching to the procurer of the votes was communicated to the voters themselves, or what privity they had with his corrupt motive. Surely, a vote must be good or bad, according to the *intent* or *purpose* with which it is given by the voter.’ These are undoubtedly cases requiring a delicate judicial discrimination to deal with them justly, and according to law: but law and equity have such to deal with every day.

The person who commits the heinous offence of corrupting or procuring another to give or forbear his vote, is subject to grievous punishment for that offence; being liable to heavy pecuniary penalties, and disability either to vote at an election, or sit in the House of Commons for the place which was the scene of his guilt, it may be, during the entire parliament. This is the stern sentence of the statute law: but that statute law has *not* enacted that any vote given by the offending party himself, at the same or any future election, should be void; but only that, *on due conviction in a court of law*, he should never be able to *vote* for the future.

For the foregoing reasons, and also those to be found in a previous chapter, it is conceived that the great principle on which the vote of the person bribed is declared, on proof, a void one, does not apply to the case of the voter bribing him, nor *ipso facto*, avoid the briber’s vote, according to either statute or parliamentary common law; and that a committee cannot hold otherwise, without invading the province of the legislature, equally as in the case recently specified, violating the ancient sacred boundary line of the judicial office, *judicis est jus DICERE, non DARE*. It is true that according to another maxim

of the law, alluded to in the preceding chapter,* it is the duty of a judge, when requisite, to extend the limits of his jurisdiction,† but the late Lord Abinger properly interpreted that maxim thus: “the maxim of the English law is, to amplify its remedies; and, *without usurping jurisdiction*, to apply its rules to the advancement of substantial justice.”‡ It is on the other hand necessary, however, to act on this maxim very cautiously: and where the legislature, in dealing with a class of facts challenging its most serious and anxious attention, has not made any provision for a case which could not have escaped its attention, except on the derogatory supposition of great thoughtlessness and shortsightedness, to give it credit for having done so *designedly*, for good reasons; or, on the other hand, treat the matter simply as *casus omissus*. ‘The judges are appointed,’ said Chief Justice Wilmot, ‘to administer and not to make the law; and the jurisdiction with which they are entrusted, has been defined and marked out by the common law of parliament.’§ It is, moreover, as has been observed truly and forcibly,|| a principle consonant to the spirit of our constitution, and which may be constantly traced as pervading the whole body of our jurisprudence,—*optima lex est quæ minimum relinquit arbitrio judicis*; OPTIMUS JUDEX QUI MINIMUM SIBI:¶ that system of law is best, which confides as little as possible to the discretion of the judge; that judge the best, who relies as little as possible on his own opinion. A judicial discretion signifies sound, advised, learned discretion: *discretio est, discernere per legem, quid sit justum*:** in the language of Lord Coke, where parties are authorized “to do according to their discretions, *yet* their proceedings ought to be limited and bound within the rule of reason and law.†† These are the principles regulating the judges of the land, in their daily administration of the law of England;—principles which even they are constantly reminded of, in the arguments of cases from time to time coming before them.

* Ante, p. 355.

† Broom's Maxims, p. 56, ‘*Boni judicis est ampliare jurisdictionem.*’

‡ *Russell v. Smyth*, 9 M. & W. 818.

§ *Rex v. Almon*, Wilmot's Notes, 256.

|| Broom's Maxims, p. 60.

¶ Bacon's Aphorisms, 46.

** 4 Inst. 41; quoted by the late Lord Chief Justice Tindal in *The Queen v. Governors of Darlington School*, 6 Q. B. 700.

†† *Rooke's case*, 5 Rep. 99, b; 100, a.

How excusable, therefore, may it be deemed to bring those principles thus pointedly before a transcendant tribunal like that of the House of Commons, acting through its organ and representative, a Select Committee, for the trial of an election petition, every one of which concerns and actually affects at least one seat in parliament? When, moreover, that tribunal adverts to the fact that it consists exclusively of members of a *legislative* body, intercalating *judicial* with legislative functions, it may be considered the less a matter of supererogation, to place great legal principles before them: especially when a noble anxiety to vindicate purity of election, at those points where execrable efforts are most perseveringly and but too successfully made to pollute it, may perhaps induce a momentary forgetfulness of those principles, the results of century upon century of profound judicial learning, sagacity, and experience.

The foregoing considerations may fitly introduce the next topic—

Bribery by THE CANDIDATE, either personally, or BY HIS AGENT. In either case, and if only a single instance be proved, the first, but by no means the only serious result is, that the election itself, as regards that candidate, is avoided.

Bribery on the part of the candidate, according to the common law, as declared by statute 7 Will. 3, c. 4, is—

After the teste of the writ or issuing or ordering of the writ of summons, or after any place becomes vacant, directly or indirectly, by himself or otherwise, before the election, giving, or promising to give, any money, present, or reward, to any voter in particular, or to any place in general, in respect of which the election is had, in order to be, or for being, elected.

Bribery on the part of the candidate, as defined by stat. 2 Geo. 2, c. 24, s. 7, is—

The corrupting or procuring, by himself or any person employed by him, by any gift or reward,—or promise, agreement, or security for any gift or reward,—any person, to give or forbear to give his vote, at any election of a member to serve in parliament.

As defined by statute 49 Geo. 3, c. 118, ss. 1, 3, Bribery is,—

Any person, by himself, or any other on his behalf, directly or indirectly, giving or procuring, or promising to give, or procure to be given, to ANY person, any money, gift, or reward,

OFFICE, PLACE, or EMPLOYMENT—*or knowing of and assenting to such gift or promise—on an [express]* agreement that such person shall, by himself or some other at his request, procure or endeavour to procure the return of ANY person to serve as a member in parliament.*

As defined by statute 5 & 6 Vict. c. 102, s. 20, Bribery is,—

The payment or gift of any sum of money or other valuable consideration, before, during, or after any election, to any voter, or to any person related to him by kindred or affinity, on account of such voter having voted, or refrained from voting, or being about to vote or refrain from voting at the election.

From these three statutory definitions combined, may be extracted the following general definition of bribery on the part of a briber,—especially when a candidate:

Personally, or by an agent, directly or indirectly, by any gift, reward, or promise of such, before, during, or after any election, CORRUPTING OR PROCURING any person to vote or refrain from voting, or to use his own, or request others to use their, exertion and interest, to procure the return of any person to serve in parliament.

Every clause, nay, almost every word, of this definition, as is the case with that of bribery on the part of the voter, may be regarded as the exponent of an extensive and important head of election law; and as indicating the severity of the struggle which has ever existed, and continues to exist, between integrity and corruption—between the law, justly jealous of electoral purity and honour, and those who, with a criminal astuteness, only too often, and too successfully, strive to evade and defeat it.

This case, as that of a bribed voter in the case of scrutiny, is brought before the Select Committee by appropriate allega-

* The word “*express*” is restricted to the specified case of “office, place, or employment.” *Note.*—In point of law, the only difference between an *express* and an *implied* contract, is one respecting the *evidence* by which it is substantiated. When once a contract is proved to exist, the consequences resulting from a breach of it must be the same, whether it had been proved by direct or circumstantial evidence. Per Lord Tenterden, C. J., *Mazzetti v. Williams*, 1 B. & Adol. 423. Where, however, a statute attaches an enormous penalty to the act of entering into a prohibited contract, by requiring proof of an *express* contract, it *really* puts intending offenders on their guard; and leaves them without excuse for a *deliberate* violation of the law.

tions in the petition: sometimes separating the charges, in form, so as that each respectively shall come within one of the three statutes under consideration; and at other times intermingling them so as to form one general charge, combining the conditions contained in all the three statutes.

A case under statutes 7 Will. 3, c. 4, ss. 1, 2, and 2 Geo. 2, c. 24, s. 7, is usually thus alleged in the petition:—*

“That before, at, and during the said election, the said [*sitting member*] was, by himself, and his agents, friends, managers, and partisans, guilty of divers acts of bribery and corruption, in order to corrupt and procure, and DID, by his agents, managers, friends, and partisans, and by many *other persons employed by him and on his behalf*,—by gifts, presents, money, employments, rewards,—and by promises, and agreements, and securities for money, gifts, employments, and rewards, and by promises, undue influence, and other corrupt and illegal practices, acts, and means,—CORRUPT and PROCURE divers persons having, or claiming to have, votes at the said election, to GIVE their votes in favour of or for him, the said [*sitting member*], or to FORBEAR to give their votes in favour of the said [*petitioner*]: that the said [*sitting member*], by reason of the said corrupt and illegal practices, was and is wholly *disabled, incapacitated*,† and ineligible to be elected and to serve in this present parliament for the said [county or borough]: and the said election and return of the said [*sitting member*] were and are wholly null and void.”

Or thus—the charge being confined to *the sitting member*, and adopting the terms of statutes 7 Will. 3, c. 4, s. 1, and 2 Geo. 2, c. 24, s. 7, and some of those in 49 Geo. 3, c. 118, ss. 1—3.

“That before and during the said election, the said P. Q. [*the sitting member*] was guilty of bribery and corruption; and DID, by gifts, presents, money, and rewards, and by promises and agreements for gifts, presents, money, and rewards, and by contracts and undertakings to give and obtain *office, place, employment*, and preferment, to and for persons having votes at the said election, or to and for other persons, CORRUPT and PROCURE divers persons, having votes at such election, to vote

* This, the ensuing, and a previous one, are taken from petitions now [5th February, 1853], pending.

† These are the words of stat. 7 Will. 3, c. 4, s. 2.

for him, the said P.Q., and to forbear to vote for the said Y.Z. [the petitioner].”

Through all three may be clearly seen running, as the main characteristic, the act of *corrupting* or *procuring* the giving or forbearing of a vote; and these all-important words “corrupt or procure” received, a few years ago, a satisfactory judicial interpretation by the Court of Queen’s Bench.* The court called attention to the words being in the disjunctive—“corrupt, OR procure:” Mr. Justice Littledale, with whom his brother judges concurred, saying, that “to ‘procure,’ is to *get the thing done*: the ‘corruption’ is completed, by *effecting an arrangement* amounting to corruption. There is a great difference between the two parts of the section. The former, applicable to the *voter*, contains the word ‘ask,’ which is not repeated in the latter:—whence it may be taken, that in an action against the party *tendering* the bribe, proof should be given of *more than a mere solicitation*. As to ‘*procuring*’—the vote should be *actually given*; as to ‘*corrupting*,’ the giving of the vote is *not* necessary; the offence is complete without the vote being given.” “I am not disposed to think,” said Mr. Justice Patteson, “that the intention of *the voter* can affect the corrupter’s liability. The corrupter’s offence is complete when *he has done* all that in *him* lay, to corrupt the voter: were this otherwise, the voter making the corrupt ‘*agreement*,’ without intending to fulfil it, would be liable under the express words of the former part of the section; while the corrupter, who had done all *he* could, would not be liable—an extraordinary result.”

If, therefore, a candidate barely and abortively *offer* a bribe,—that is, without the voter’s “agreeing, or *appearing*† to agree to it,” though the former may have incurred liability to an indictment for a misdemeanor in *attempting* to commit the offence of bribery, he has not actually committed that offence, and consequently is not liable to the penalties and disabilities attached to it by law. The decisions of committees are in accordance with this view of the matter. If, however, instead of being resisted, the approach of the briber be really or even

* *Henslow v. Fawcett*, 3 Ad. & Ell. 51; and 4 Nev. & Mann. 585, (S. C.)

† *Baker v. Rusk*, 15 Q. B. 874, 877.

only *apparently* met by the person sought to be bribed, the act done by the corrupter has completed his own offence, and thereby entailed upon himself all the consequences annexed to that offence by the law; which, as we have seen, looks not to discover whether the person sought to be corrupted had or had not a vote, in fact, to be purchased, provided he claimed one, or intended only to deceive the briber, and not to vote at all, or for the briber's opponent.

There is a broad line of distinction, in morals and in law, between the case of one personally perpetrating an act of bribery and corruption (or, which is the same thing, instructing another to do it on his behalf, or "sanctioning and ratifying it when done") and one employing an agent to conduct an election lawfully only, but sought to be made responsible for an act of bribery and corruption committed, *unknown to him*, by that agent. The law of Parliament, nevertheless, annexes one signal consequence to both cases; a consequence of loss and disability: and the sound policy of that law may be amply vindicated, as it is hoped will appear in the course of this chapter.

To constitute an act of personal bribery, it is not necessary that the candidate should, *propria manu*, deliver the money or other reward, or give the written promise or security for the corrupt consideration. If for that purpose he use the hand of another, he makes it his own, on the long-established rule of law, *qui per alium facit, per se ipsum facere videtur*;* i. e. he who does an act through the medium of another party, is in law considered as doing it himself: and in order to put an end to much quibbling and uncertainty in the administration of the law by Select Committees, and make it incumbent on them to apprise the House of the exact state of facts which had been disclosed by the evidence, in the year 1841 a short act was passed—in strict conformity with the spirit of stats. 2 Geo. 2, c. 24, and 49 Geo. 3, c. 118†—which is worthy of particular consideration at this point of our inquiries. The act in question—stat. 4 & 5 Vict. c. 57,—“*requires*” the Select Committee, whenever any charge of bribery shall be brought before it, SEPARATELY and DISTINCTLY to report upon the fact or facts of BRIBERY which shall have been PROVED before it;

* Lord Coke's 1st Institute, 258. Or, as commonly cited, *qui facit per alium, facit per se*.

† Pickering's Controverted Elections, p. 5 (n.)

and ALSO, WHETHER OR NOT it shall have been PROVED that such bribery was committed WITH THE KNOWLEDGE AND CONSENT of any SITTING MEMBER OR CANDIDATE at the election.”*

In the older cases,† the resolutions of committees always were—simply, ‘that *A. B. was guilty of bribery* ;’ without discriminating whether by himself, or his agents. Before the passing of the statute just cited, “it was the universal *practice*, said Mr. Austin, in arguing the case of the *Second Newcastle-under-Lyme*,‡ for members unseated on the ground of bribery, not to stand again.” In the *Cambridge* case, one of the latest before the passing of the statute in question, Mr. Manners Sutton was unseated for bribery ; and the fifth resolution of the Committee§ was at first drawn up in these terms, “that it appears to the committee that *certain agents* of the Honourable J. H. T. M. S. was guilty of bribery and treating at the last election for the borough of Cambridge:” Mr. Austin, for the petitioner, stated that that resolution “was not in the usual form, and begged the committee to come to a resolution according to the form generally adopted:” and after discussion, the committee yielded to the suggestion, and altered their resolution as follows.

“That it appears to the Committee that *the Honourable J. H. T. M. S., by his agents*, was guilty of bribery, &c. In subsequently arguing the *Second Newcastle-under-Lyme* case, Mr. Austin explained that he had taken this course in the *Cambridge* case, “in order to meet the usual practice, and to prevent any question arising *as to his incapacity to be re-elected*: so as to make it appear on *the face* of the resolution, that ‘*Mr. S. was, by his agents, guilty of bribery*. Since the statute,” he added, “after the resolutions in the *Ipswich* and *Southampton* cases,|| framed in the same way, the members who had been unseated for bribery ‘*by their agents*’ did not attempt to stand at the subsequent election:” and at the close of the reply in the *Second Newcastle-under-Lyme* case,¶ the counsel of the sitting member who had stood and been re-elected under such circumstances, was challenged, but the chal-

* Post, p. 267, A.

† *Arg. 2nd Newcastle-under-Lyme*, B. & Aust. 574.

‡ Pages 574, 575.

§ Printed Minutes, pp. xii. 364.

|| B. & Aust. 266, 401.

¶ Id. 575, 583.

lenge remained unanswered, to produce a single case in which a candidate returned at the first election, and, on the avoidance of that election, on the ground of bribery, re-elected at the second election, had, on a petition, been held to be duly so re-elected, where the Committee on the first election had reported him to have been guilty of bribery, *by his agents*.” *

Since the passing of stat. 4 & 5 Vict. c. 57, it has been the almost uniform custom of committees to report in conformity with its requirements. In two, however (*Sudbury* and *Ipswich*), no report of this kind was made; the committees who sat in the earlier part of the session of 1842 having apparently overlooked the clause of the statute that rendered it incumbent upon them to report upon this matter. But their omission to do so having been made the subject of remark in the House of Lords,† a more correct practice in this respect was adopted by the committees who were subsequently engaged in the investigation of charges of bribery.

The following may serve as a type of such resolutions; and they are here given at length, as illustrating an important principle of election law, and showing the modern mode of carrying out that principle into practical operation.

The petition alleged, in the common form, bribery and treating against the sitting members and their agents; the payment of head money; notorious and systematic bribery; and prayed that the election might be declared void.

“That the Right Honourable E. S. and the Honourable E. F. L. G. are not duly elected burgesses to serve in the present Parliament for the borough of D.” ‡

* In the *Dungarvon* case, K. & O. 11 [A. D. 1834], it was stated by Mr. Harrison and the late Sir William Follett, in the course of their argument, that for the forty years then [A. D. 1834] preceding, down to the *Oxford* case, P. & K. 58 [A. D. 1833], in which, on a petition alleging, among various other grounds, bribery and treating, the election was simply declared “void:” there was no instance in which a member unseated for bribery or treating, had attempted to stand on the vacancy so created. The committee, nevertheless, upon that occasion, decided that one who had been re-elected, after having been declared not duly elected at a former election declared “void”—had been duly elected on the second occasion. It was strongly urged for the sitting member, that, though the former petition had contained three charges—of bribery, treating and intimidation, there was no evidence that the former committee had avoided that election on the one ground of bribery.

† See Hansard’s Printed Debates, vol. 62, c. 1369; B. & Arn. 160.

‡ These were the Resolutions of the Borough of Derby Committee in 1848. See Printed Minutes, p. 176.

“That the last election for the said borough of D. is a void election.”

“That the Right Honourable E. S. and the Honourable E. F. L. G. were, *by their agents*, guilty of bribery and treating at the last election for the borough of D.”

That it was proved before the committee,—

That E. S. was bribed with 25*s.*; that W. D. was bribed with £1; that S. R. was bribed with 25*s.*; that T. R. was bribed with 25*s.*; that T. K. was bribed with £1; that T. B. was bribed with £1; that J. B. was bribed with 15*s.*; that D. S. was bribed with 25*s.*; that J. M. was bribed with £5.

That it was NOT PROVED to the committee that these acts of bribery and treating were committed *with the* KNOWLEDGE AND CONSENT of the said Right Honourable E. S. and the Honourable E. F. L. G.

“The committee also find, that a practice has existed in the borough of D. at the last as well as at former elections, of placing freemen as members on a nominal committee, and paying them for pretended services. The committee believe that this practice has obtained very extensively in the said borough, and consider it their duty to report it to the House.”

By resolutions such as these, a candidate, J. Q. H., was unseated, in 1841, for the borough of Newcastle-under-Lyme,* on a petition imputing bribery to him by his agents. The case was argued as coming under the operation of stat. 4 & 5 Vict. c. 57: the petitioners' counsel contending that the consequence of bribery was unaffected by that act; the sitting member's counsel, that since the statute, bribery by an agent did not affect his principal, unless he had given the agent authority to commit that bribery. On the election ensuing (in June, 1842) this avoidance, J. Q. H. stood as a candidate, and was again returned. His opponent had given the usual notice at the election that all votes given for J. Q. H. would be lost and thrown away, on the ground of his having been incapacitated and ineligible by reason of his having been declared guilty of bribery, by his agents, at the preceding election. The second committee sat in July, 1842, and the exact question argued was, whether, on a sitting member's having been found guilty of bribery *by his agents*, but *without* proof that they had bribed with his *knowledge and consent*, his election having been avoided on that

* B. & Aust, p. 436.

ground,—he was eligible at the election taking place in consequence of such avoidance?

It was argued for the sitting member, that the resolution of the former committee, in the form directed by stat. 4 & 5 Vict. c. 57, had pronounced him *personally* not guilty of the acts of bribery proved before them: thereby conclusively and solemnly adjudicating that he was personally innocent of them. It was yet sought to treat him as though he had been with equal solemnity and conclusively convicted of that bribery, by having been personally implicated in it—so far, at least, as to visit him, by the loss of his election, with the parliamentary penal consequence of that guilt. Admitting that an election may be avoided on the ground of bribery by the sitting member personally, or by his agents, though without his knowledge or consent; it was further sought to affect him, penally, by fixing on him a *prospective* disqualification, quite independently of the avoidance of the election so vitiated by bribery. It was contended, however, that to entail such *prospective* disqualification, the bribery must have been committed by the candidate personally, or by an agent appointed by him *for that purpose*. The statute 7 Will. 3, c. 4, requires, by the words "or by any other ways or means in his behalf, or at his charge," as judicially interpreted, that the guilty acts should have been done at his desire, or with his knowledge.* The recent statute 4 & 5 Vict. c. 57, requires a report to the House, whether the acts have been done with the *knowledge* or *consent* of the sitting member; and assuming them to have reference, not to the loss of the seat on the particular occasion, but to some ulterior consequences to the candidate, it is clear that these consequences, whatever they may be, cannot ensue, unless the bribery had been committed with his knowledge and consent. 'On such an issue it becomes of the very essence of the inquiry, to show that he was cognizant of the corruption; for the object being to fix on him personal incapacity, strict proof may well be demanded to show that he was implicated in the transaction complained of.'† It is attempted to show that the words "*upon such election*" in stat. 7 Will. 3, c. 4, s. 2, extend the disability of one infringing its enactments, to the election ensuing on that which such infringement has occurred, on the ground that the two are in fact

* Ante, p. 264.

† Rogers on Elections, 260, note (b).

but *one* election; and that as he has been proved disqualified to sit on the former, he is equally, and on the same ground, disqualified to sit on the latter. The two are, however, in every respect distinct elections. In the latter every essential step has to be taken anew: there are *a new writ*, nomination, polling, indenture of return, and possibly, even, wholly new candidates. A new writ is necessary, because the old one had been satisfied, and was *functum officio*, by the return.* How, then, can it be said that this new writ does not initiate a totally *new election*?

For the petitioner it was argued thus:

The sitting member had been *expressly* declared guilty of bribery, by his agents, and cannot sit on the second return. In point of law, though there have been a *poll*, and a return consequent on it, void because of the person returned being unable to sit, in consequence of previous disqualification, and a second poll and return are necessary in order that a valid return may be made—the whole proceeding constitutes but ONE ELECTION. As, therefore, the person who had been formerly returned, and that return is declared void, so his present return must be declared void—for the statute expressly declares that he shall be “disabled and incapacitated to serve *upon such election*”—and be taken as no member of parliament, and as if he had *never* been returned or elected. A member ejected from his seat because he had obtained it by bribery is incapacitated by both common and statute law: and he could be so incapacitated by the former, only on the principle that the two returns constitute but *one election*: no other reason can be imagined. It is only the statute of William that disables the briber to sit on his *first* return; and that act draws no distinction between bribery by the candidate or his agent. In whatever way the bribery occurs, if “on behalf” of the sitting member, it renders him incapable of serving on his election; and proceedings on this act have always gone on the assumption that the two forms of election, constitute only *one actual election*. It will be admitted that a sitting member *personally* cognizant of bribery at the former election, cannot be returned at that ensuing the avoidance of the former: for if he could, he might reap, on the second occasion, the crop which he had sown on the former,† and so render

* See Mr. Pickering's Remarks on Treating, &c. (2nd. ed.) 44, where this argument is urged with much force.

† This argument was urged with conclusive force, but ineffectually, in the *Second Norwich* case, 3 Luters, pp. 479 et seq.

the parliamentary proceedings on the former occasion utterly nugatory.

The statute 4 & 5 Vict. c. 5, did not alter* the law respecting bribery, as it had not relaxed the penalties, but only facilitated the proof of bribery; and the object of requiring the special report of the committee, as to whether the bribery had been committed with the "knowledge and consent" of the sitting member, was, that if such had been the case, he himself, as well as the voters, might be proceeded against criminally. It would distort the language of the statute.

It is a fallacy to regard the disqualification for being re-elected as a *criminal* proceeding, to which one man ought not to be subjected for the voluntary offence of another. The disqualification is under the statute 7 Will. 3, c. 4, and the common law, for the purpose of securing the freedom of election by the prevention of bribery; and such disqualification is not inflicted by way of punishment or penalty, upon the sitting member, as to whom the consequences are quite collateral and incidental: the true object is—to prevent the influence which the bribes given at the former election would otherwise have on the electors at the second, and prevent the candidate then reaping the benefit of the acts of corruption committed by him at the former. Had *punishment* been the object, the legislature would not have imposed a mere special and limited disqualification like the present, but would have inflicted a general and unlimited disqualification, like the perpetual disfranchisement inflicted by statute 2 Geo. 2, c. 24, s. 7, on both parties to a bribe. If this be so, the principle of the disqualification is equally applicable to the former and latter election: it is the same, whether the bribery, in either case, be committed by the sitting member personally, or by his agent, with or without his knowledge and authority: reason and policy draw no distinction, with such objects in view, between bribery by the candidate personally, or by the hand of his agent.

After due deliberation, the committee gave effect to the arguments of the petition; and resolved, that "J. Q. H., Esq., having been declared by a Committee of the House of Commons guilty of bribery *by his agents* at the previous election for the borough

* On the former occasion, Mr. Austin, who here is arguing against the sitting member, had then argued *for* him, that the statute of Victoria had altered the law respecting bribery.—B. & Aust. p. 448.

of Newcastle-under-Lyme, and that election being now avoided, was incapable of being elected at the election which took place in consequence of such avoidance;” and that he had not been duly elected. On the petitioner’s striking off a sufficient number of his opponent’s votes to place the former in a majority, the committee declared him to have been duly elected.*

This case, which may be regarded as a leading one, involves principles of the greatest interest and importance in Parliamentary Election Law, and topics which are discussed whenever a question of bribery and corruption comes before a Select Committee, with reference to the effect of that bribery and corruption on the relations between candidate and constituency. It is therefore proper to examine, briefly, the nature of those principles, and the sources whence they have been derived.—No one questions the power of the House of Commons, even independently of any aid derived from the legislature, to nullify a voter’s corrupt exercise of the franchise, by striking the vitiated vote off the poll: but the House cannot go further, and prospectively disfranchise. That can be done by the legislature only; and it has done so by statute 2 Geo. 2, c. 24, s. 7. Therefore it is, that on a re-election, in consequence of an avoidance of a former election on the ground of bribery, those whose votes were struck off as having been bribed, may vote, unless in the mean time convicted of bribery in due course of law.

In the case of a bribing candidate, whether he do it personally or by agents, the House has a like common law power of ousting him from the seat obtained by such means—a power asserted and acted upon repeatedly, previously to the statute of Will. 3; which has been already stated to be an act as strikingly *declaratory*, in all its parts, of the common law, as any such act now on the rolls of Parliament. We need go no further back to ascertain what was the common law before the passing of this statute, than the year 1646,†—i. e. half a century previously—in which that eminent lawyer and statesman, Sir Bulstrode Whitelocke, afterwards twice Lord Commissioner of the Great Seal, published his “Notes upon the King’s Writ for Choosing Members of Parliament.” In his 42nd chapter,‡ he writes thus:—

“As the law of Parliament permits no exemptions or restraints

* B. & Aust. 583, 584.

† Whitelocke, vol. I. p. 10, Editor’s Preface.

‡ Vol. I. p. 387.

against the *freedome* of it : so it forbids solicitations, bribery, or gratifying of sheriffs, head officers, or others, by any person ; or giving MONEY, OR REWARDS (*it were well if it extended to drinke and intertainments*) to freeholders, or inhabitants, to obtaine their suffrages, or to procure* one to be elected ; and, in such cases, prooffe being made thereof in the committee of privileges, and by them reported to the House of Commons, a member obtaining his election by such undue,† and unworthy means, *will be thrown out with disgrace, and the election adjudged voyd* ; as it was in the case of Thomas Long, who gave the Mayor of Westbury, four pounds, for his assistance to get him to be elected burgesse for that towne in Parliament, who was thereupon elected. But the matter coming to be examined and proved, the House of Commons adjudged the mayor to be fined and imprisoned, and Long was putt out of the House :”† “for this corrupt dealing,” says Lord Coke, from whose Fourth Institute§ Whitelocke had taken the case, “was to poison the very fountain itself.” On another occasion,|| Whitelocke as distinctly declares the common law : “In like manner such as are guilty of bribery and corruption, or other heynous crimes, are not fit to be chosen to serve in Parlement ; butt if they be members of Parlement, they will be, uppon complaint and prooffe against them, removed againe and expelled by judgment of Parlement from that high trust, as unfitt for it. And hereof there are many antient precedents in the rolles of our Parlements : and of later times in the case of the Viscount St. Albans . and of the Earle of Middlesex, yett fresh in memory, and in divers others extant in the journalls of the Houses.”

If, then, such were the common law of Parliament fifty years before the passing of the statute of 7 Will. 3, c. 4, then it ‘DECLARES’ in terms, that whoever gave ‘money or reward in order to be, or for being elected,’ was *ipso facto* ‘disabled and incapacitated upon such election, to serve’ in Parliament for such place : it ‘declares’ that he is no member of Parliament—and shall not act, sit, or have any vote or place in Parliament:

* This is the very language of the declaratory statute 49 Geo. 3, c. 118, ante, pp. 428, 429.

† This is the word used in the Elections’ Petitions’ Act, 1848, and its predecessor, ante, pp. 301, 302.

‡ Ante, p. 425.

§ Page 23.

|| Whitelocke’s Common Law, vol. I. p. 461.

and finally ‘*declares*’ that he is as if he had been never returned or elected*—and exactly thus the House had dealt with Thomas Long, in the year 1585. It is true that the word “bribery” is not used in the act, and it has been suggested† that it was properly omitted: but though it do not appear, the thing signified by it is disclosed with all possible distinctness. In the Resolution of 1677, giving meat and drink to electors, was declared to be bribery, incapacitating the person who had given it, from serving “*upon such election*,” in Parliament. These latter words appear in the statute of William; but the history of their introduction seems to be this. When the Bill was first brought into the House, the clause concerning ‘disability’ and ‘incapacity,’ was expressed in general terms—“disabled and incapacitated to serve *in Parliament* for such county or place, &c., and shall suffer and undergo such *pains, punishments, penalties*, imprisonment, censures, expulsions and incapacities as the —”‡ Had the clause stood, it would have created a general incapacity to serve *for that place in Parliament*, which had just been made of only triennial duration. On the third reading, however, when the question was, whether the Bill, thus worded, and so extensive in its signification, should pass, it appears by the Journals of the House, that “an amendment” was proposed to be made, “by leaving out the last words, ‘*and shall suffer*,’ &c. down to the words ‘*as the —*,’ and by inserting, “UPON SUCH ELECTION:” and so the act passed; and it is upon these three words that such repeated discussions have arisen before Election Committees. The clause stands thus: “every person so giving,” &c. is “hereby declared and enacted disabled and incapacitated *upon such election* to serve in Parliament for such county, place,” &c.§ On the one hand it is argued, as it was in the *Second Newcastle-under-Lyme* case, in effect, that the words “upon such election” were intended expressly to confine the disability and incapacity to the particular election at which the bribery was practised—that they are *merely* words of reference to that particular election during which the prohibited acts were perpetrated; and that there is therein nothing prospective, nor mention of

* The word “declare” is used four times in this one short section.

† 2 Peckwell, 183; *Cambridge*, Barr. & Arnold, 182.

‡ 11 Commons’ Journals, 387; and see Pickering’s *Controverted Elections*, p. 43.

§ Post, p. 172, A.

any future vacancy. It may be seen, from the arguments in the case last referred to, how these topics are dealt with, on the one side and the other.

If the statute be rightly regarded as declaratory of the common law, then the words "upon such *election*" must have had, when used, a common law signification; and then the question arises—what did the "election" mean? Did it signify a *valid** return to a writ of election, by virtue of which the seat in the House was full? That a member could not be said, in point of law, to have been *chosen* (electus) except by the "free and indifferent" voices of the electors; that one returned by *corrupt* voices, has not been "chosen" at all; and that consequently there had, as yet, been no 'election,'—a void election being none at all—and the writ remained unsatisfied? It was admitted in the argument of the petitioner's counsel in the *Second Newcastle-under-Lyme* case,† that the member ejected on the ground of bribery, could be incapacitated for being re-elected, *only* on the principle that the two elections, or rather forms of election, constituted in fact only *one election*; and asserted that proceedings under the statute of William "have always gone on that supposition—and that as the member is disabled by the words of the act from sitting on the first election, he is also disabled from sitting on the second, by *the legal construction* of the act.‡ This was the argument adopted in the *Maidstone* case§ [A.D. 1838], and in the *Second Horsham* [A.D. 1848], the latter citing the former case, the *Second Newcastle-under-Lyme* case, and the *Dungarvon* case||

* "When a vacancy once occurs, whether in consequence of a dissolution, the death of a former member, or any such cause, the seat, in the eye of the law, continues vacant, and *the original writ is in force until a valid and legal election has been made*, and it matters not how many invalid elections may intervene; because the writs, issuing in such cases, are to be considered in the nature of an *alias* or *pluries* writ, referable still to the original writ, which remains unsatisfied until a good and sufficient return has been made."—*Camelford*, Corb. & D. 249; cited in *Maidstone*, 677, 678. Mr. Pickering has observed, that "no such words as 'we command you *as before* we have commanded you,' have ever been found in an election writ; that it expires, as *functum officio*, the moment that the return has been made, and the new election takes place on an entirely new and independent writ."—*Controverted Elections*, p. 44.

† Austin, *arguendo*. Barr. & Aust. 575.

‡ Barr. & Aust. 575, 576.

§ F. & F. 677.

|| K. & O. 6.

[A.D. 1834]. If it be answered, as it was answered, that there are in fact two elections, because there are two *writs*; it may perhaps be replied, that the second may be treated in point of law, as a mere authority to the returning officer to make a second attempt to execute the original writ.*

Whatever technical or theoretical difficulties, however, of this kind may be started by ingenious reasoners, the law of parliament is past all dispute,† that one ejected for his own act of bribery cannot be suffered to sit for the same place, if returned on the second election occasioned by the avoidance of the first. Were this otherwise, it would follow, as was said in the *Dungarvon* case,‡ that, “after upwards of fifty thousand or sixty thousand pounds had been expended in bribery, at the former election, he who had done it might go down to supply the vacancy occasioned by his own profligacy.” That liberal construction of the words “upon such election” may well be favoured, which obviates so monstrous a corollary.

In the *Hindon* case, in 1777, General Smith having been unseated for bribery, was re-elected; but on petition, founded on his incapacity, his second election was avoided: he was prosecuted by order of the House, and convicted; and on his being called up for judgment, his counsel, thinking it a proper topic of mitigation of punishment, informed the court that his client had been a few days before re-elected by a great majority for Hindon,—“there not being the least shadow or pretence for any charge of bribery at *that* election.” Lord Mansfield thus sternly interposed—“Do you think, brother Davy, that it *mends* your client’s case that he had the impudence to return a second time to the scene of his offences, and has reaped the fruit

• “The words, ‘such election,’ in the statute, have been understood and explained to mean—any election made to fill the particular seat for which the writ issued,—which *although a new writ* issues, the second election is to do: for it cannot be said to have been supplied by the first, nobody having been thereby entitled to take possession of it.”—*Dungarvon*, K. & O. 13, *arg.*

† “The doctrine is now,” said Mr. Harrison and Mr. Follett, in the *Dungarvon* case (K. & O. 11), “the established law of Parliament, that a candidate deprived of his seat for bribery or treating” [they were speaking in 1834], “is incapable of being elected, or sitting, for the particular vacancy so occasioned. This is laid down by Mr. Shepherd (pp. 54, 55), Mr. Rogers (p. 71 et seq.), Serjeant Heywood (*Counties*, chap. vii. p. 359), Mr. Roe (vol. i. p. 142), Mr. Male (p. 356), and every other text writer of authority.”

‡ K. & O. 11.

of his former corruption?"—Mr. Douglas adds,* that "the sentence was, for this reason alone, aggravated, by requiring from General Smith security for good behaviour for three years."

It is to be noted, further, that the Act 7 Will. 3, c. 4, recognizes no distinction between bribery by the member himself, or his agent: the provisions of the act attach to bribery committed by 'any person, himself, *or* by any other ways or means *on his behalf*.' It has been seen, that on the ordinary principles of law, the act of the agent is the act of the principal, where he authorizes or adopts it. *Omnis ratihabitio, retrò trahitur, et mandato priori æquiparatur*: a subsequent ratification has a retrospective effect, and is equivalent to a previous command. In election law, however, it is a perfectly well settled principle, that though the agent of a candidate commit an act of bribery not only without his principal's knowledge or consent, but contrary to his *bonâ fide* and strenuous injunction, the seat is lost. This is the doctrine affirmed by the first and second *Newcastle-under-Lyme* cases;† the second *Ipswich* case;‡ the *Nottingham* case;§ the *Durham*;|| all of them subsequent to the stat. 4 & 5 Vict. c. 57. This may seem, at first sight, and to one familiar with only the ordinary administration of law, a startling proposition; but a little reflection on the nature of the case will demonstrate that proposition to be founded on the broadest and highest grounds of public policy, morality, reason, and justice.

It is a man's voluntary act to become a candidate for the responsible distinction of representing his fellow citizens in parliament; and in doing so, he aspires to fill an office of great PUBLIC trust, in the due discharge of which the whole kingdom has a direct interest, as well as in the mode in which such a high office is obtained. He need employ no agents, unless he pleases—but merely submit his name to the electors, as a candidate for their suffrages. If, however, he think it proper to employ agents, he becomes responsible *to the public* for the acts of every one of them in the conduct of his election, so far as any of their acts may affect the validity of his right to be elected, returned, and to sit, as a representative of the people. It is entirely a public matter, in which the public are vitally inte-

* 4 Dougl. 292.

† Barr. & Aust. 436, 561.

‡ Id. p. 585.

§ Id. 165.

|| Id. 224.

rested: and he subjects himself in so doing to public conditions of responsibility of a necessarily strict nature, for the protection of the public—his private rights are merged in, or rather subordinated to, those public rights and correlative public responsibilities, with which, alone, he has thenceforth to concern himself. From that moment, the ordinary rules of law applicable to corresponding private relations, cease to be so, as too small for the exigency, which requires far larger rules, but still based on the same principles of policy and equity. He is presumed to know, when he becomes a candidate, and uses the agency of others for that purpose, that he becomes answerable to the public for the wrongful acts of those agents, unknown to himself, and contrary to his desires; but answerable no further than this:—not criminally,* but only, as it were, negatively: he can neither acquire nor retain a right to sit in parliament, derived in part, from an act of corruption by one of his own agents. He must not complain at being required to resign a privilege conferred upon him in violation of the law. It is

* In the case of *Felton v. Eusthope*, an action for bribery penalties tried by Lord Tenterden at Nisi Prius, in the year 1822, he is reported to have observed, that “It was perfectly true, if an agent who may be employed for various purposes to canvass, &c., does without the knowledge, privity or approbation of the principal, promise a sum of money, the principal is not liable to be sued under this act for the penalty. No person is liable to be sued for that penalty, unless that which was improperly done, was done by his authority. If an agent bribes voters *with or without* the knowledge and direction of the principal, it will void the election: the principal is to that extent liable, but not so in an action of this sort. It must be proved to be done with the knowledge and authority of the principal.”—Rogers on Elections, 259. In his argument in the *Nottingham* case (B. & Arn. 164), Mr. Austin stigmatized this note (which Mr. Rogers states that he copied from the MS. Notes of the late Mr. Harrison, Q. C.), as “loose and imperfect, evidently *ex relatione* of a mere *obiter dictum* at Nisi Prius, and which ought never to have found its way into the respectable pages where alone it is reported. . . . It is impossible to suppose that Lord Tenterden can have meant to say that the candidate shall be answerable for the corrupt acts of any person who may be employed in canvassing, or for some other particular purpose. The only sensible interpretation the case admits of appears to be, that ‘the agent’ of whom Lord Tenterden speaks, for whose acts of bribery the candidate will be liable, though done without his express authority, must be an agent employed as well for canvassing as for all other purposes relating to the election; in short, deputed by the candidate, and accountable to him for the entire management of the election; and such a relation between the parties of itself implies that the candidate must have actually known, or, at any rate, have had the means of knowing, what the agent was doing in order to carry the election.”

nothing to *the public*, that his agents in fact committed a crime most injurious to that public, on his behalf, without his knowledge: all that concerns them is, by what means was the election obtained; and if contaminated by corruption, they repudiate that election. Candidates are *thus far* answerable for the conduct of those persons whom they permit to manage and conduct an election, under their eyes, in such a way that it is impossible they should be ignorant of those persons being concerned in their election, and being the means of securing their return. It is not necessary that they should be *criminally* answerable for the acts of such agents—since no person is *criminally* liable, before a committee, but they must answer for them to their constituencies and to the House of Commons: for they have adopted their conduct *by adopting the seat which was the result of it*, although they may not have been acquainted with every minute particular of it during the proceedings.* It has been well remarked,† moreover, that where bribery is in contemplation, the ACCREDITED agent of the candidate is, from obvious motives of guilty policy, studiously kept in ignorance of it, and carefully entrusted with authority to do only what is *legal*. It would be as reasonable to expect proof that a candidate had given an agent written instructions to bribe, as to be able to discover that those engaged in the acts of bribery were his confidential agents. The true rule is—and that the established one,—to hold a candidate responsible, as far, at least, as regards the acquisition and tenure of his seat, for the acts of those whose services he engages, pays for, or adopts; discarding all consideration as to the degree of confidence which he may be supposed to have placed in them. If this be not so, the public is entirely at his mercy. The question between the two parties is, not whether HE be duly elected, but whether THE ELECTION ITSELF be valid, or void. It is true that the loss of his seat is the consequence of such avoidance; but that is a circumstance, or consequence, altogether collateral to the inquiry itself, and to the object of it.‡ There is no private right in the case: it is simply a matter of protecting and vindicating a public right of infinite moment. The public intervenes as a

* *Ipswich*, K. & O. 355 [A. D. 1835]; *Second Ipswich*, B. & Aust. 606 [A. D. 1842].

† Rogers on Elections, 259.

‡ *Id.* 260 (n.), and cases there cited.

party to the inquiry, having an interest in securing the freedom of election, paramount to any private rights; and cannot be fettered by objections which might fairly be allowed to prevail, if the sitting member and petitioner were the only parties.* It seems altogether a fallacy, therefore, to regard the avoidance of a seat, through corruption practised, unknown to the candidate personally, by one of his agents, as a hardship, and in the nature of a penalty or punishment inflicted on a morally innocent man. Before a steadfast contemplation of general consequences, that fallacy vanishes. It is chiefly pressed, when the question relates to the disabling a candidate from presenting himself again to the electors, at the election occasioned by his own having been avoided for the bribery of an agent. Is a candidate, on the one hand, to be allowed to sit on such second election, having bribed, directly or indirectly, nine-tenths of the constituency, through his agents; and on the other hand, is a like consequence to follow a single act of spontaneous, and to himself unknown, bribery? Between these two cases, what principle must guide a committee? Is it really that of penalty, or punishment inflicted, on either candidate or constituency? If so, a whole constituency may be punished for the delinquency of an individual; and an innocent principal disabled from representing that constituency through no fault of his own, but the unknown wanton fault of another. If the legislature, however, have said that this shall be so, it is useless to argue from inconvenience; if not, we have then to deal with the common law of parliament. But how can that common law inflict such penalty? Or has it done so? It best consists with principle to regard the act, not as designed to be one of penalty, or attainder,—not to partake, in any degree, of the nature of a *criminal* proceeding; but simply as securing a constituency against undue influence, and preventing a candidate's profiting by the use of it. It is, in short, not punishment that is thus aimed at, but prevention. For securing this object, a balance of inconveniences and evils must needs be struck: governed by a consideration of the ruinous consequences which would ensue, if a candidate were held unaffected by his agent's unauthorized bribery; and a corrupt constituency allowed to re-instate one temporarily dislodged on account of that agent's bribery. What motive

* Rogers on Elections, 260, note (b); ante, p. 417.

would candidates thenceforth have for selecting prudent and virtuous agents; or a corruptly-disposed constituency for restraining their criminal propensities?

It is only in a loose popular sense that the word “penalty” or “punishment” is used, when attempting to resist the consequence of disability, disqualification, or incapacity, which the law has annexed to the acts of which we are speaking. In the same way it might be said, that if a man advance money or goods on a guarantee, which, through noncompliance with statutory regulations, he cannot enforce, and has consequently lost what he had advanced, he suffers ‘the penalty’ of non-compliance with those regulations. Regarding, then, the disability to serve in Parliament, “upon such election,” in its true light, it is denuded of the character of penalty or forfeiture, and seen as simply a measure of precaution and prevention, no more than commensurate with the exigency. One falling within the operation of this rule, thus understood, may represent in Parliament the *county* within which is the borough he cannot represent, as a borough, on the vacancy which his own or agent’s acts had occasioned; he may, if similarly disabled in respect of the county, yet represent a particular borough within it: and this, because, were it otherwise, the rule of law would be extended beyond the occasion to which it was desired to be applicable. It would probably also be held, on this principle, that if A. and B. were returned to parliament for a particular county, or borough, and B. were to be afterwards unseated, on the ground of bribery; and immediately afterwards, and coincidentally with the issuing of the new writ, A. were to die,—there was nothing to prevent B. being returned in the place of A., together with D., in the place of B., disqualified. This is a case strongly testing the principle on which the rule is founded. B. would *not* be ‘serving in parliament *upon*’ the ‘*election*’ in respect of which he had been unseated and declared disqualified. Suppose, again, one disabled by bribery from being re-elected on the vacancy thereby occasioned, after his place had been duly filled by one who, after taking his seat, dies, or accepts disqualifying office, whereby the seat is once again vacant, what is to prevent the former candidate from *then* contesting the seat, but the application of a principle which would inflict virtual disability through the whole parliament? Yet the same constituency would return him, which he had

been alleged to have corrupted. It would have been otherwise, had the statute of William contained an enactment like that of stat. 49 Geo. 3, c. 118, ss. 1 and 3, disabling him “to serve in THAT PARLIAMENT FOR SUCH county, borough, or place.” The distinction is obvious and great, between the words “upon such election,” and “in that parliament;” and the legislature must be presumed to have had, and to have, good reasons for maintaining the distinction. It would, indeed, be going a great way, to disable a man to serve throughout a parliament, in respect of a single unauthorized and unknown act of bribery by an agent.

We have now seen the consequences annexed by the law of parliament to a single act of bribery committed by either a candidate directly and personally,—or, with his knowledge and consent, by his agent; or by that agent without his knowledge and consent. In all these cases, the seat acquired under such circumstances is void. It must not be forgotten, however, that AN ACT OF BRIBERY must be established, in order to entail this consequence. The mere *attempt*, or *offer* to commit it, will not suffice, as has already been fully explained. It may here be added, that the 54th section of the Municipal Corporation Act,* which is, *mutatis mutandis*, almost *verbatim* the same with the 7th section of stat. 2 Geo. 2, c. 24, adds to the words in that section “shall corrupt or procure,” the important words “OR OFFER to corrupt or procure.” Had these words been in the 7th section of the 2 Geo. 2, c. 24, an offer by a candidate to bribe would have been placed on the same footing as an actual bribe. This is a legislative recognition of the construction which has been placed on the latter clause of the 7th section of the Bribery Act by both committees of the House of Commons and courts of law.—It has been held,† under this 54th section of the Municipal Corporation Act, that the offence of “*corrupting*” a voter is complete, where the bribe is offered *and accepted*, and the voter *promises* to vote in pursuance of the corrupt contract, though he may break his promise, or never have intended to perform it:—but that where a bribe is offered, and *not accepted*, the offence of “*offering to corrupt*” is completed; and the proper question for the jury is—“whether the offer was *accepted*.” If it were, the former,

* 5 & 6 Will. 4, c. 76.

† *Harding v. Stokes*, 2 M. & W. 233.

if it were not, the latter offence is established, and the verdict must be accordingly.

The modern procedure of Select Committees, especially since the year 1841, when stat. 4 & 5 Vict. c. 57, was passed, removes much practical difficulty experienced before that time, as the election reports of the last twenty years amply evidence,* in ascertaining *the fact* whether a previous committee did or did not pronounce their decision on the ground of bribery. Innumerable ingenious arguments of counsel there testify the necessity for some change in the system. It certainly seems strange that when a committee had the petition before them as the record, and the evidence was applied to its respective allegations, the committee did not, in every instance, by their resolution, deliver judgment *secundum allegata et probata*, specifying, *in perpetuum rei testimonium*, not only what was their decision, but on what grounds it had proceeded. It is now, however, at all events with reference to bribery, otherwise. The resolution of the Committee directly and conclusively establishes the fact of a candidate's having been guilty, and that whether personally or by his agents, and also whether with or without his knowledge, of bribery at the election which is the subject of inquiry. The mere production of such a resolution is notice to all the world of the legal and conclusive finding which it purports to contain. It is the judgment of a court of competent jurisdiction. In the *Dungarvon*† case, the counsel for the sitting member stated—"that bribery, if imputed as a disqualification, must be either specifically found, or at any rate clearly collected from the evidence"—and in that case, after much discussion on the point, the minutes of the evidence before a former committee were put in and read;—"and if the former committee had found Mr. Jacob 'guilty of bribery' at the last election, there would not have been any opposition to the petition." This is now the invariable practice; and all questions as to evidence are silenced by the production of the resolution. By the force of that document, the member expressly found by it guilty of bribery, is disqualified for standing at the new election; and if he be returned, the election will, on petition, be declared void. To entitle, however, an opponent to be seated, after such a con-

* See, among very many others, the *Dungarvon* case, K. & O. 6, and the *Second Maidstone*, F. & F. 671.

† K. & O. 27, 28 [A. D. 1834].

test, by a Select Committee, proper evidence must be laid before it, that the disqualification of the sitting member was properly evidenced to the electors, so as to cause votes given afterwards for the disqualified person to be considered as thrown away and lost; in which case the petitioner, proving himself in a majority after deducting such vitiated votes, will be seated. In the second *Newcastle-under-Lyme* case, the following was the form of “notice and protest” adopted.*

“To W. U. L., Esq., the returning officer of the borough of Newcastle-under-Lyme. We, the undersigned electors of the borough of Newcastle-under-Lyme, do hereby give you notice, that the Select Committee of the House of Commons, duly appointed to try the matter of the petition of certain electors of the said borough, complaining of an undue election and return of members to serve in this present parliament for the said borough at the last election for the said borough, so far as the same concerned J. Q. H., Esq., one of the persons so returned, did, on the 11th day of May, 1842, make their report to the House of Commons, *a copy of which said report, duly attested, is hereunto annexed.* And we do hereby give you further notice, that the said J. Q. H. having been, by the said committee, *found guilty of bribery at the said last election for the said borough as aforesaid,* is incapable of being elected on the present vacancy to serve in this present parliament for the said borough, and therefore we, the undersigned, do accordingly object to, and protest against, the nomination of the said J. Q. H. as a candidate, and against the election and return of the said J. Q. H. as a member to represent the said borough of Newcastle-under-Lyme at the present election; and we do give you further notice, that all votes given in favour of the said J. Q. H. at this present election of a member to serve in parliament for the said borough, will, on account of the ineligibility of the said J. Q. H., be of no effect, but entirely lost and thrown away. Dated this 13th day of June, 1842. (Signed) G. H.
J. M.”

It is of great importance that this document should be framed, as is the above, with due distinctness, so as to obviate all pretence for the electors afterwards alleging that they had not had as full notice† of the disqualification of the candidate for whom they had voted, as the nature of the case admitted of. In the

* B. & Aust. 569, 570.

† Ante, p. 232.

Second Cheltenham case,* [A.D. 1848], the notice stated simply, that “the Honourable C. F. B., a candidate at this election, *was guilty*, by himself or his agents, as well of bribery as of treating, and other corrupt practices, at the election for the said borough held on the 30th day of July last [1847], and is thereby rendered ineligible and incapable of being elected to serve as a burgess in parliament for the said borough, upon the present vacancy.” No evidence was then adduced of the fact of bribery and treating on the former election, and the committee resolved that the sitting member “was not duly elected”—and that, “being a candidate at the election for the said borough, held on the 30th July, 1847, he had been, through his agents, guilty of *treating* at such election,” and “in consequence thereof was, at the last election held on the 29th June last, incapable of being elected, or sitting in parliament for the said borough.” The sitting member’s counsel then admitted that the *number* of electors who had been served with the above ‘notice’ was sufficient to place the petitioner in a majority, *if* it were held that the ‘votes of such electors had been thrown away.’ It was then argued against the petitioner, that his ‘notice’ was altogether insufficient and ineffectual. That no *acts* of bribery or treating were stated in it; it was not founded on a resolution of a Committee of the House of Commons; or the determination of the fact by a competent tribunal; or on some notorious fact capable of being immediately ascertained by the electors; it amounted to a mere *allegation* of disqualification, neither proved, admitted, nor notorious, and so far from being capable of immediate ascertainment at the time when given, the evidence of it had occupied the committee several days. Nor had there been any judgment, of either a committee, or court of law: and in fact, it was proved that on the ‘notice’ being given at the election, the sitting member publicly contradicted the fact of his being disqualified. These reasons appear to have satisfied the committee, who finally simply declared the election void; thereby refusing to seat the petitioner, because he had not succeeded in proving that his opponent’s votes had been thrown away. In the *Second Newcastle-under-Lyme case*, no question was raised, nor indeed could have been raised successfully, as to the sufficiency of the notice; and the committee seated the petitioner.

It may be, however, that no resolution of a Select Committee

* Printed Minutes, *passim*; P. R. & D. 234.

specifying the disabling grounds on which they had proceeded can be produced, as no evidence of the kind had been laid before them. Under these circumstances substantive evidence of the bribery on the former occasion must be given, as if on an original enquiry.* This was the course adopted on two recent occasions, in the year 1848, the *Second Cheltenham*,† as we have already seen, and in the *Second Horsham*.‡ In the former, a petition having been presented on the ground of bribery and treating, *claimed the seat* for the unsuccessful candidate; but the claim being abandoned at the earliest moment before the committee, the election was declared void, and on the second election that unsuccessful candidate stood and was returned. He was then petitioned against, on the ground of his having been disqualified for standing at the second, because of bribery and treating at the former election. It was urged on his behalf, that as the seat had been claimed on the former occasion, the evidence now offered ought to have been then brought forward; and not having been, that the parties were “estopped” from going into it on the second occasion. The Committee resolved that it was competent to them to adduce the proposed evidence, and the matter was gone into at length, and successfully, as far as related to avoiding the seat.

In the *Second Horsham*, the seat had *not been* claimed on the former occasion by the present sitting member, and it was urged by the petitioner’s counsel, that it had consequently been impossible to give evidence of bribery and treating by the sitting member and his agents on that occasion; that it was only on the then petition that he could be made to answer for his acts at the former election. In this case, also, the Committee allowed the evidence to be fully gone into, which was held to establish a case of *treating*; and the Committee, declaring the sitting member disabled, by reason of it, from standing at the ensuing election, and not duly elected, seated the petitioner, on his placing himself in a majority. The notice served in this case on the electors was, though longer and more formal than that in the *Second Cheltenham* case, liable to all the objections which had been successfully urged against the latter. It con-

* *Maidstone*, F. & F. 679.

† Printed Minutes, *passim*; P. R. & D. 226.

‡ Printed Minutes, *passim*; P. R. & D. 242.

tained a 'mere allegation of disqualification' and that in the most general terms, for giving 'meat, drink, entertainment or provision to or for *divers persons* having votes,' naming none. It was in fact a petition turned into a notice, but not followed or accompanied by any names. No such objection, however, seems to have been taken to the sufficiency of the notice on these grounds, as had been urged in the *Horsham* case; and the different issues of the two cases may, perhaps, be referred to the different views taken of the sufficiency of the 'notices' which had been served on the electors. In both these cases, which have occasioned much discussion, the Committees appear to have done right, as far as relates to allowing the parties to prove that *in point of fact* a legal disqualification existed at the time of the election. They were to try *the matter of the petitions*,* and if those petitions disclosed a case of disability on the part of a candidate to stand at the election complained of, the Committee were bound to *try* that matter, and give a true judgment according to the *evidence*. Whether that evidence might or might not have been adduced on a former occasion, was quite beside the question before the Committees, who had to administer the law of parliament as they found it. If the principles of that law have been correctly expounded in the foregoing pages, both Committees acted in conformity with it in receiving evidence of what had occurred at the previous election, as far as concerned a party, to each election, accused of bribery and treating at that previous one, and then standing at the latter one. Their procedure, however, has been, as above intimated, the subject of considerable comment; and the matter may be seen argued in a work written, shortly afterwards, on that particular question,† with so much force and ingenuity, that it is proper to consider the reasons there adduced. On the doctrine laid down in the text, the decisions of the two Committees in question can be supported, as far as they proceeded, upon the principle of both the common and

* It was on this ground that the Evesham Committee (F. & F. 529, 531), allowed a sitting member disqualified on the ground of personal bribery, to continue before the committee resisting the claim of the petitioner to the vacant seat.

† Mr. Pickering's *Controverted Elections*, *passim*. Mr. Pickering states, in a note, that he argues the question of bribery and treating, as on the same footing. In the present work, the point relating to Treating is discussed in the ensuing chapter.

statute law, as declared, if no where else, by the act of 7 Will. 3, c. 4,* that bribery *ipso facto* disables and incapacitates a man for being elected, or serving upon the election in respect of which it is committed. If that be so, the question becomes one merely as to the *media* of proof, as regards first, the question before a Select Committee, and secondly, the question before the electors, with a view to treating them, as having lost, by throwing away, their votes: a Select Committee has an undoubted right, and is indeed bound, to entertain evidence as to the act having been committed, which entails the disability. If sufficiently evidenced by the resolution or judgment of a previous committee, it will be conceded that it justifies and requires that before which it is adduced, to declare the election void, as far as regards the person named in that resolution. If there have been no such resolution, it will be necessary to establish the fact of disability by appropriate substantive evidence; and it does not affect the question to speak, as has often been spoken, in arguments before the committees on such occasions, of ‘entering into and trying the merits of a previous election.’ If there be any inconvenience, he at least cannot complain of it, whose own voluntary acts and conduct on both occasions induce the necessity of the inquiry. In one or other of these ways, then, may be established before a committee, the facts which suffice to annul a second election, as far as it is dependent upon the conduct of a candidate at both that election and the one out of which it arose. All that a Select Committee can do, under such circumstances, is to declare him not duly elected at the second, and that it was a void election.

The second question is that which relates, in the first instance, to the electors at the election, and in the second, to consequent proof before the Select Committee.†

* Ante, pp. 425, 426.

† “We cannot try the merits of the former election,” said the committee in the *Second Ilchester* case, 2 Peck. 245 [A. D. 1804], in deciding that a voter was not incapacitated by bribery at an election, from voting at the election ensuing the avoidance of it. In citing this decision (ante, p. 435), it is said, that for the committee to have done so, would have been to usurp legislative powers; and this might, at first sight, seem to militate against the doctrine contended for in the text above. It is, however, not so, with regard to either principle, or authority. As to principle, a bribing candidate ought not to stand on the election ensuing that avoided by his own bribery, lest he should thereby reap the fruits of that bribery:

That a vote may be thrown away by the wilful act of a voter who persists in giving it to one whom he knows to be ineligible, is so thoroughly well established, that nothing but an act of parliament can alter the law. How then is the voter to be fixed with knowledge entailing such a grave consequence? The answer is, the best means practicable must be resorted to, not to give him demonstrative, but reasonable proof, regard being had to the time and the occasion. If he be not satisfied, he may disregard the notice or communication made to him; and if on the matter being subsequently judicially examined, it cannot be proved that the incapacity did in fact exist at the time of the election, *and* also that he had had sufficient notice of the existence of that fact, neither he, nor the candidate for whom he had voted, will be prejudiced, for a Select Committee will determine the vote, and the election, valid. If, again, it shall hold that the incapacity did exist, but that the notice of it was insufficient, the committee can not determine that the vote had been thrown away; but only that it was ineffectual, because given in ignorance, to one who could not profit by it: on which account the election will be set aside, and the voter may effectually exercise his franchise at the next. It thus appears, that the voter must use his discretion, when he receives what professes to be notice of the candidate's incapacity. If he be content with it, he will either not vote at all, or vote for another; if he be not content with it, and a committee afterwards be of his opinion, that he had not had sufficient notice of an actual incapacity,—or that though the notice was sufficient, it regarded a non-existing incapacity,—in such case the voter has sustained no prejudice. But if the committee's decision should be that there was an incapacity, and that he *had* had sufficient notice of it, he cannot complain, if it hold that he had thrown away his vote at the election. Circumstances may render the exercise of his discretion on such occasions, one of more or less difficulty and risk. If the alleged incapacity be one, for instance, arising out of the candidate's being concerned in some

but the voter whom he had bribed may well be allowed to vote on the second election, because he who had corrupted him can *not* be a candidate; and the voter may then vote honestly for another. And there is no *authority*, in either decisions of Election Committees, or statute law, for disabling a voter to exercise his franchise on the second election, if he shall not, in the meanwhile, have been legally incapacitated to do so, by a lawful *conviction* for bribery. Ante, p. 163.

government contract—and the fact be not suggested till actual proof in time for the election be impossible, all that can be reasonably required, is such notice to the elector, as may enable him fairly to exercise his own discretion, as to acting or not acting on the notice given to him. If the incapacity arise out of notorious facts, the electors will be under no embarrassment as to acting upon them, especially when brought home to them by formal notice. If, again, the candidate admit the incapacity, or the facts alleged to constitute it, the voter's difficulty in like manner ceases. Suppose, however, that that incapacity should arise out of an alleged act, or acts, of bribery at a former election : and suppose that even names should be specified, and that the voters have the opportunity or disposition for inquiring into the truth of the imputation : the individuals in question, and the candidate, or any of them, may deny the fact. What is the voter then to do ? No one at the election has authority to receive evidence on oath, if any such be adducible, upon the subject : and while the voter is trying to ascertain how facts stand, the election is over, without his having voted. In what respect then, is a notice adding the *name* of a person alleged to have been bribed, practically more efficient than one alleging, with equal positiveness, the facts of bribery, without the name ? Even in the simplest case which can be proposed—that which occurred in the *Second Newcastle-under-Lyme* case,*—of a certified copy of the resolution of a Select Committee being annexed to the notice or protest : it is conceivable that such a document may be wholly or in part spurious, and have therefore imposed upon the electors.

It has been contended,† that if the fact out of which the incapacity arose, was neither admitted by the party concerned ; nor too notorious (a vague term for practical purposes) to require an admission or denial ; nor capable of being easily ascertained ; the disqualification must *actually* exist, and not be contingent on the result of subsequent inquiry : in other words, that the mere *charge* ought not to disqualify, in the absence of a conviction by a competent tribunal : that if it could, there might be thrown on a Select Committee the duty, for instance, of afterwards trying for high treason one returned as a member of the House of Commons, on a petition against his return. To this latter case it may be conclusively answered, however, that disqualifica-

* Ante, p. 466.

† Pickering, p. 87.

tion for treason or felony does not exist, till *attainder*, as expressly stated by Lord Coke;* that mere *indictment* carries no disqualification for parliament, till conviction.† But the case is widely different, where a man comes forward as a candidate to serve in parliament, who can be proved to have committed acts expressly declared by the law to disable and incapacitate him, “on such election,” to serve in parliament for the place where he has committed those acts. *Ipsa facto*, he is disabled, and his election declared a nullity: nor can he defeat the law of parliament, by any act of his own, such as abstaining from a claim of the seat, thereby or otherwise depriving a committee of the power of adjudging him expressly to have done such acts: so adjudging, however, not by way of penalty or punishment, but simply to secure the freedom and purity of elections. The House of Commons, moreover, says Whitelocke,‡ as a court, and council of state and justice, is guided by peculiar, more high, and politic rules of law and state, than the ordinary courts of justice are, in matters between party and party; and, considering the object of the law which it so peculiarly and exclusively administers, may deem unnecessary proof having been adduced on a former occasion, if it be adducible on that with which the House, through its committee, is immediately concerned.

In the year 1844, in the Ecclesiastical Court,§ it was held, in accordance with a judgment in the Privy Council, that ‘*excommunicatio ipsa facto*,’ must be preceded by a *declaratory sentence* of a competent court. “It is impossible,” said Sir Herbert Jenner Fust, “to consult the authorities, and not see that *sententia declaratoria* is requisite: that there is no case in which excommunication can be incurred, without a declaratory sentence Before a person can be visited with the consequences of excommunication, he must be *pronounced* guilty of the offence by which he incurs this penalty:—and when the declaratory sentence has been pronounced, the law has already defined the particular penalty, namely, excommunication:—but the consequence of this penalty never can attach to any person who has had no opportunity of defending himself. It

* Ante, p. 181; and see Whitelocke, c. 99.

† 1 Comm. Journ. 118; 104 Comm. Jour. 519; ante, p. 111.

‡ Ante, p. 417.

§ *Titchmarsh v. Chapman*, 3 Curteis, 840.

appears, as was stated by Lord Brougham in delivering judgment in the case of *Mastin v. Escott*,* in the Privy Council, that in every passage in *Lyndwood*, in which “*excommunicatio ipso facto*” is said to be incurred, the expression used is—‘*sententia declaratoria*’—‘*incurrit sententiam excommunicationis ipso facto*.’ The penalties attaching to excommunication are, imprisonment for six months, but by recent legislative enactment,† no civil penalty or incapacity attaches, or arises, in respect of such excommunication.”

This doctrine may at first appear to favour the argument that a parliamentary conviction of bribery is requisite, to induce that incapacity of a candidate which renders votes for him lost and thrown away :—but the cases are not parallel. According to the true construction of the ecclesiastical law, and in accordance with the first principles of English law, a *sentence* must precede excommunication—i. e., in such a case the penalty of six months imprisonment: but the case of parliamentary law under consideration, is not to be regarded as one of penalty, at all; and the adoption of the principle suggested would, as it has been attempted to show, militate against the spirit, and frustrate the object, of the electoral law. It appears proper, therefore, to regard the ineligibility of a candidate on the ground of his having committed bribery, as *a fact*, in existence at the time when the notice founded on it was given to the voter. It is admitted to be contrary to natural justice, that when a *judicial* sentence is pronounced, entailing punishment, the party subjected to it should not have had the opportunity of defending himself; but this is totally inapplicable where the question is *solely* one of qualification or disqualification in point of fact, for representing, in parliament, those whose rights must be vindicated, at least as rigorously, as those of the candidate for such representation.

Applying the principles, above discussed, to the decisions of the *Second Cheltenham* and *Second Horsham* cases, while it seems difficult to support the former, so far as it proceeded on the ground of insufficient notice of disqualification, both are in accordance with parliamentary law, as far as applicable to the case of bribery. Whether it be thus also in the case of treating is a matter which has excited difference of opinion, and will be found discussed in the ensuing chapter.

* 2 Curteis, 693.

† 53 Geo. 3, c. 127, s. 3.

Assuming, however, that a sufficient notice of the ineligibility of a candidate is duly given to the electors, who are thereupon deemed to have "thrown away" their votes by disregarding it; the next question is, as to the effect of such notice,—whether the candidate, who, after striking from the poll all votes thus thrown away, succeeds in placing himself in a majority of good votes, is entitled to be declared duly elected?

The affirmative is so well, and has been so long, settled as the general law of the land, alike in municipal and parliamentary elections, and is founded on such obvious grounds of reason and justice, that it needs no assertion or vindication. Were the negative of the proposition to be upheld, this absurd and mischievous consequence amongst others might follow, as argued successfully before the House of Lords, in the case of *Hawkins v. Rex*:* that a majority might prevent an office being ever filled up at all, by constantly voting for a disqualified person.

Few propositions of law rest on stronger *judicial* authority than that now under consideration. In the year 1777, for instance, Lord Mansfield says—"Upon the election of a member of parliament, where the electors *must* proceed to an election, because they cannot stop for that day, or defer it to another time, there must be a candidate, or candidates: and in that case, there is no way of defeating the election of one candidate proposed, but by voting for another;"† and Lord Truro cited this opinion, in his judgment in the recent case of *Gosling v. Veley*; in which the doctrine in question was elaborately discussed by the judges of the Court of Queen's Bench, and the judges of the Court of Common Pleas and Exchequer in Error—that is, by all the common law judges of England. The judgment of the Court of Queen's Bench,‡ which was affirmed by the Court of Error, was long considered; and contained the following luminous exposition of the doctrine that a majority of electors throws away its voice, and allows that only of the minority to be heard and prevail, by knowingly voting for a disqualified candidate.

"Where an elector, before voting, receives due notice that a particular candidate is disqualified, and yet will do nothing but

* 2 Dow. Cases in the House of Lords, 138.

† *Rex v. Munday*, 2 Cowp. 538; *Gosling v. Veley*, 12 Ad. & Ell. 416.

‡ 7 Q. B. 438, 439.

tender his vote for him, he must be taken voluntarily to abstain from exercising his franchise; and therefore, however strongly he may in fact dissent, and in however strong terms he may disclose his dissent, he must be taken in law to assent to the election of the opposing and qualified candidate; for he will not take the only course by which it can be resisted, that is, the helping to the election of some other person. He is present as an elector; his presence counts, as such, to make up the requisite number of electors, where a certain number is necessary: but he attends only, as an elector, to perform the duty which is cast on him by the franchise he enjoys as elector; he can speak only in a particular language; he can do only certain acts; any other language means nothing; any other act is merely null; his duty is to assist in making an election. If he dissent from the choice of A., who is qualified, he must say so by voting for some other *also qualified*: he has no right to employ his franchise merely in preventing an election, and so defeating the object for which he is empowered and bound to attend. And this is a wise and just rule in the law. It is necessary that an election should be duly made, and at the lawful time; the electoral meeting is held for that purpose only: and but for this rule, the interest of the public, and the purpose of the meeting, might both be defeated by the perverseness or the corruption of electors, who may seek some unfair advantage by postponement. If, then, the elector will not oppose the election of A. in the only legal way, he throws away his vote by directing it where it has no legal force: and in so doing, he voluntarily leaves unopposed, i. e. assents to, the voices of the other electors.”

In the Court of Exchequer Chamber, Mr. Baron Rolfe (since Lord *Cranworth*, C.) expressed himself with equal decision, though dissenting from the judgment of the Court of Queen’s Bench on other grounds.

“In the case of elections, the electors have only one duty to perform, one power to exercise, i. e. to elect *an eligible* person. The question, in substance, put to each elector is this: ‘for what eligible candidate do you vote?’ If the elector will not answer this question, then the election proceeds as if he were absent: he forms no part of the assembled electors. If he answer it by naming some one whom he knows to be ineligible, as, for instance, if he name a woman in a case where a man only is eligible, then the election proceeds as if the voter had declined

to vote at all. He has wilfully declined to give a vote which can in any way influence the result of the election. The election is to be decided by the majority of those who take part in it; and no one is deemed to take part in it, who wilfully votes for a person whom he knows to be ineligible.”*

This case was carried by appeal to the House of Lords, and argued in February, 1852—but judgment has not yet been delivered. The counsel† for the *appellant*, however, did not question the propositions above referred to, as applicable to the law of parliamentary election, but only contested their relevancy to the case of parishioners voting for a church rate.

Thus far has been traced the chief parliamentary consequence of a voter's having been bribed by a candidate, either individually, in his own proper person; or by one whom he has constituted his agent, *for that purpose*; or by one whom he had employed as his agent, but not for that purpose, and who had bribed without his principal's knowledge, or consent. The same consequence, it has been seen, is annexed to the act done in any of these three ways—viz. the election may be avoided; the candidate is disabled from standing at the ensuing one; and if he do, all votes given for him, after due notice of his incapacity, will be nullified, and entitle his opponent to be declared the sitting member, if he succeed in establishing a majority of the valid votes which have been given on either side.

It must be observed, that this negative result, for such it may to some extent be designated, does not constitute the only serious consequence of a single act of bribery by a candidate or his agent: nor was it to secure this result alone, which could have been attained without it, that the stat. 4 & 5 Vict. c. 57, was passed, requiring a report to the House, by the Select Committee, “separately and distinctly upon the fact or facts of bribery which should have been proved before them,” and if such had been proved, then whether that bribery should or should not have been proved to have been “committed with the knowledge and consent of any sitting member, *or candidate*, at the election.” The act simply orders the Select Committee to do this, but indicates no course to be taken in conse-

* 12 Q. B. 364, 365.

† Serjeant Byles and Mr. Mellor, Q. C. The author was present at the argument.

quence of it. While one result, however, is that which has been explained, namely, to afford conclusive evidence of the fact, with a view to any subsequent election—and a Select Committee appointed to inquire into it; another is, doubtless, that pointed out in the argument of the *Second Newcastle-under-Lyme* case*—namely, to enable the House, if it think proper, to institute criminal proceedings against offenders, in a flagrant case of corruption. Nor does this exhaust the energy of this short but potent statute. Three lines of it sufficed to throw down boldly the brazen wall of immunity which till then had surrounded those charged with never so many glaring acts of bribery and corruption—namely, the difficulty of establishing that *agency*, without which the facts of bribery could not be approached. Now, however, “it shall not be necessary to prove agency, IN THE FIRST INSTANCE, before giving evidence of those facts whereby the charge of bribery is to be sustained:” and in addition to this, “the committee SHALL RECEIVE evidence upon the WHOLE MATTER WHEREON it is alleged that bribery has been committed.”

To ascertain the full scope and determine the true limits of the inquiry thus made obligatory on a Select Committee, requires a careful consideration of the language used by the legislature. Before proceeding to examine the structure of the act, it may be observed, in order to account for a preamble with so extensive a scope, introducing so compendious an enactment—the whole act containing only one short section—that in the bill, as originally drawn, the preamble was applicable to a much larger and more comprehensive act, containing, besides the single section of which it now consists, several other clauses and distinct provisions relating to the general object declared in the preamble; one of them consisting, moreover, of an enactment that *treating* should be *bribery*, within the meaning of the act.† When the bill went up in this form to the House of Lords, all was struck out, except that which now constitutes the act.‡ It was passed in the year 1841, and was the first direct interference of the legislature, on the subject of bribery, for a space of thirty-two years (namely, since the year 1809,

* Barr. & Aust. 574 [A. D. 1842].

† Printed Papers, House of Commons, 1841, 1st Session, vol. ii. p. 365.

‡ *Arg., Lewes, Barr. & Aust. 114, 115; Cambridge, Barr. & Arn. 181.* The word “bribery,” as remarked by Mr. Austin in the latter case, occurs no fewer than five times in the single section of which the act consists.

in which had been passed statute 49 Geo. 3, c. 118). It recites, that “the laws in being were not sufficient to *hinder corrupt and illegal* practices in the election of members to serve in parliament;” and it was in order to “hinder” those practices that the statute was passed. If so, the “hindrance” was intended to consist in the terror inspired by the increased facilities of investigation afforded,—without *preliminary* proof of *agency*; the enlarged field for such investigation,—“the *whole matter* ;” and the separate and distinct report “to the House” on the facts of bribery proved; and above all, whether the sitting member or the candidate knew of, and consented to, the bribery. By this means both briber and bribed were brought bodily before the House of Commons, almost *flagrante delicto*. Before this act, the Select Committee were empowered and bound to inquire into and determine “the merits of the return or election,” to try “*the matter of the petition* referred to them,” whether that consisted of bribery or any other matter of complaint. The words, therefore, “the *whole matter*” are either superfluous, if confined to that disclosed in the petition, or must indicate some more extensive field of action than already lay before the Select Committee under the act then in force (stat. 2 & 3 Vict. c. 38)† for trying election petitions. The words, however, are not “the whole matter *of the petition*,” but “the whole matter *whereon it is alleged that bribery has been committed*,” by which, it is presumed, is meant, that in the language of the act, “whenever *ANY charge of bribery*”—it is not said against whom—“shall be brought before the Select Committee”—the committee is required to “receive evidence” (that of course they were already bound to do, as to the “merits of the election,” and the “matter of the petition”) “on the whole matter wherein it is *alleged*,” that is, in the petition, “that bribery has been committed.” These words may receive a satisfactory construction, by supposing a petition framed under the act “alleging” bribery connected with the election: not such only as would deprive the candidate, or sitting member, of a right to retain or acquire the seat, but also “*ANY charge of bribery*.” *Whatever* ‘charge’ of bribery is ‘brought,’ whatever ‘allegation’ there is that

• Ante, pp. 428 et seq.

† Statute 4 & 5 Vict. c. 58, repealing this act, was passed on the same day as stat. 4 & 5 Vict. c. 57.

bribery has been committed, they must receive evidence on the *whole* matter, and ‘separately and distinctly report the proved facts to the House, and finally, whether ‘such bribery’ was or was not committed with the privity of the candidate or petitioner. There seems nothing in this act to limit the ‘allegation’ in the petition concerning bribery, which may have been by the candidate, his agent, or a stranger or strangers, and in the last case, on an extensive scale, and of a ‘general character;’ and the committee may report to the House, as ‘facts proved before them,’ that acts of bribery were committed by the candidate personally, or by his agents, with his knowledge and consent, or by his agents, ‘without such knowledge or consent, *or by others*, naming *all* persons^{as} bribing, or bribed, and how they were bribed.’

Having thus minutely examined the structure of this statute, its general scope may briefly be stated to be, that after removing a great hindrance to the discovery of bribery, the Select Committee is to keep in view two objects; *first*, to “receive evidence” of the corruption of the electors, individually or collectively, and report *separately and distinctly* to the House all facts of bribery proved before them, without reference to the sitting member or candidates being implicated in the result of the inquiry; *secondly*, with reference to these facts also, to report separately and distinctly whether the bribery established by them had or had not been proved to have been committed with the knowledge and consent of the sitting member, or candidate. It has been argued that this latter provision may have been added to guard the interests of the sitting member or candidate from being unjustly put in jeopardy by the latitude of proof opened by the act, through the tendency of the mind, familiarized with details of corrupt acts, to run on too readily to the conclusion of a corrupt intent and instrumentality on the part of him who has profited by them.* There is no allusion in the act to *agency*, except where preliminary proof of it is dispensed with; and the parliamentary law as to the principal’s liability for the acts of his agent, as far as relates to the loss of his seat, is not touched by the act. The change in respect of agency was a very bold and salutary one, and its operation shed dismay over those who were subjected to it.† This new power,

* *Nottingham*, Barr. & Arnold, 161, 162, *arg.*

† *Ante*, p. 250.

however, requires to be used with extreme caution, lest great injustice should be done to those who are thus suddenly put, as it were, without the pale, at least for a while, of legal proof against them in respect of acts for which they may have nevertheless, to be visited with heavy responsibility.—The rules of evidence, themselves, are not altered by this act, which only postpones the period of applying them, in order to determine liability.

The practical operation of the act may be thus illustrated. Suppose, before the passing of stat. 4 & 5 Vict. c. 57, the question before a Select Committee had been—whether Jones had bribed Brown to vote for him. Proof must have been given that Jones had done so personally, or through his agent, Smith. In the latter case, Smith must have been shown to have been the agent of Jones, or the very first step failed, as no man can be liable for the acts of a mere stranger. Yet Smith might have been all the while, and beyond any moral doubt, the agent of Jones, and for the very purpose of bribing Brown; only no evidence could be adduced of the fact in the first instance.

Since the statute in question, the case stands thus.

Smith is regarded, when first introduced to the committee, as a mere stranger: yet a witness may be asked as to the fact, whether Smith gave Brown a sovereign to vote for Jones?—For the object is, first, to get at *the fact* of bribery: but that fact will avail nothing, as against Jones, unless Smith be *ultimately* shown to have been his agent. Here, at all events, if the answer be in the affirmative, is established *a fact of bribery*, committed on the part of Smith, and a voter; and the committee has thus far obeyed the act, by ‘receiving evidence’ of that fact, without previous ‘proof of agency.’ It will proceed to deal with that fact according to law. If Smith be afterwards proved his agent, Jones loses his seat; and in addition to this, if done by Smith, with his knowledge, is subjected to penalties, and prosecution. If Smith be not proved to have been Jones’s agent, then the committee will report thus: that a voter, Brown, had been paid a sum of a sovereign by Smith, to vote for Jones: but that Smith had not been proved to have been the agent of Jones: nor had it been proved that the sovereign had been so paid with the knowledge or consent of Jones. Whether or not the result would be, merely to declare the election void, or also that Jones, on a petition, had been duly elected, would depend upon the allegations and prayer of the petition, and the extent

to which the bribery could be proved to have affected the majority, in point of fact. Thus the House is in a position to direct Smith and Brown to be prosecuted; and Jones has in no way suffered by the relaxation, however perilous to him it seemed at first, of the old rule of agency. His security has been, throughout, the committee's suspending its judgment *concerning him*, till proof should have been adduced of agency: without which, he knew all along, as they knew, that the evidence of fifty witnesses would go for nothing,—though exposing, perhaps, fifty other persons to punishment, and purging the electoral roll of as many names.

There are reported several decisions of committees upon the statute.

In the *Sudbury** case, a servant girl at a publichouse, during the election, having proved that a great number of voters were crowding past the room where she was, to another, where a *stranger* was giving each one that came up to him “something”—but she could not say what,—and that one of them, proved to have been a voter, spoke to her, was asked “What he had said to her, when she spoke to him about crushing up stairs?” The question was objected to, as a conversation between the witness and a third person not shown to be connected with the sitting member, and not having taken place in his presence. After deliberation, however, the committee resolved, “that the question can be put, inasmuch as the committee may have to report to the House *upon facts of bribery*, though not committed with the knowledge or consent of the sitting member, or his agent.” The witness having been re-called, answered the question thus: “He (the voter) said he was going *to take his money*.” The *fact* of the voter's having received money from the stranger, was unquestionably admissible under the statute, before connecting him with the sitting member: but the only ground on which the *declaration* of the voter was admissible is, that it formed part of what lawyers call, the *res gestæ*—that is, it was one of the circumstances surrounding the principal fact, reflecting light upon it, and *determining its character at the moment*. It is not a mere hearsay statement, falling within the prohibitory line of *res inter alios acta*, which would have properly excluded it.

* Barr. & Aust. 245 [A. D. 1842].

In the *Ipswich* case,* also, a *declaration* by a person who had not been proved to be the sitting member's agent, respecting an alleged corrupt transaction, was admitted: counsel urging that it was the very case contemplated by the statute: the object of the question was to arrive at a *fact* of corruption; and the *agency* of the declarant need not be proved, till it was sought to connect his corrupt act with the candidate. The committee, after deliberation, resolved that the proposed question was admissible, "as it cannot have the effect of affecting the sitting member, *unless agency be proved.*" This was a correct decision.

In the *Southampton* case,† a witness who had done no more than occasionally attend meetings of the committee of the sitting member, was, after deliberation, allowed to be asked what he had stated respecting a voter, to a person who was connected with the sitting member only so far as being a member of his committee, and acting at the place where the committee was held. This question was objected to, as illegal, whether under, or independently of, the statute, which does not affect the principle by which conversations between third parties, or declarations by them,—which is the case under consideration,—are excluded, when those parties are not shown to have been agents of the parties sought to be affected. In this case, the question seems really to have been treated by the committee, as one of *agency*, which in their opinion had been, in fact, established by the evidence.

In the *First Nottingham* case,‡ declarations of a third party not proved to be an agent of the sitting member, were admitted, after deliberation, as evidence in support of a charge of bribery, counsel being called upon, "before putting a question as to anything said by a third party, to state that *he believes* the answer will tend to prove some fact of corruption implicating the parties—meaning thereby, not the sitting member, but parties engaged in the *res gestæ.*"§ Though this be somewhat obscurely worded, it is evident, from their language, that the committee designed to act upon either the rule referred to in

* Barr. & Aust. 257 [A. D. 1842].

† Barr. & Aust. 380 [A. D. 1842].

‡ Barr & Arnold, 168 [A. D. 1843].

§ The Resolution also said, that the evidence rendered admissible before proving agency, "must be legal evidence; and that the rules of evidence have not been altered by that statute."

the above remarks on the *Sudbury* case, or intended to signify, by “the parties engaged in the *res gestæ*”—those who could be afterwards affected with *agency*. If so, their decision was correct.

The same course was adopted in two instances—in the *Second Nottingham*,* and in the *First Cheltenham* case.† In the *Bolton* case,‡ the committee admitted conversations, as to the fact of bribery, with a voter alleged to have been bribed, though the conversation had occurred, not in the presence of the sitting member, or his agent, and a *fortnight* before the election: the committee yielding to the argument, that the statute required them to make a “separate and distinct report” respecting the facts of bribery. The facts in this case seem not to be fully stated. As they stand, they appear scarcely to warrant the reported decision.

These instances will illustrate the spirit in which committees are disposed to deal with “the extended sphere of their inquiry;” to adopt the language of the *Nottingham Committee*,§ “wishing to afford to the counsel for the petitioners every latitude consistent with the ordinary rules of evidence.” The ‘ordinary rules of evidence,’ however, with reference to agency, as none knows better than the experienced lawyer, it is often a matter of critical discretion to apply with propriety: while the non-observance, or the faulty application, of those rules may be attended, in the cases which we are considering, with serious, and indeed irreparable mischief, where a decision is final to all intents and purposes between the parties.

Where, after pursuing the inverted order of procedure required by stat. 4 & 5 Vict. c. 57, a great mass of facts has been accumulated before the committee, it requires no little care and acuteness on their part, and also on that of counsel, to appropriate them properly to proof of the several propositions which they were designed to substantiate. They may, for instance, justify a committee in reporting against numerous voters, as having received bribes, and against as many who have administered them: while to the discriminating eye of a lawyer, there is not a shred of evidence connecting that bribery with either the candidate, or his agent, however far otherwise it may appear to an eye un-

* Barr. & Arnold, 193, 195 [A. D. 1843].

† Printed Minutes, *passim*; P. R. & D. 184.

‡ Printed Minutes, *passim*; P. R. & D. 50.

§ Barr. & Arnold, 168.

practised in such matters. Or it may be, that there is amply sufficient evidence for that purpose, but not obvious to a layman unacquainted with those refined distinctions and latent inferences respecting agency which are nevertheless founded on the principles of strict and also substantial justice. In a court of law or equity, a million sterling may depend on the wrongful admission or rejection of one single act, or statement, as that of an agent.

This subject, however, remains to be discussed in a future chapter. There, also, it will be endeavoured to show, in conformity with what has been already stated,* that under stat. 14 & 15 Vict. c. 99, s. 2,† both petitioners and sitting members are themselves competent, and compellable, to give evidence touching the election, which is the subject of inquiry. If this be so, the act in question gives, indeed, a new and serious significance to the widely-worded statutes against bribery, and all the ramifications of the doctrine of agency, by which that bribery is to be brought home to those who either sanction, *or seek to profit by it*.

With reference to liability to the parliamentary consequences of bribery, it is to be observed that it attaches inevitably to any candidate guilty of it, who appears at the election. If he be then guilty, personally or by his agents, of bribery, and being unsuccessful, afterwards petition against his successful opponent, and claim to be seated in his place, even though he should unseat that opponent, the latter may, in his turn, show the petitioner to have been also guilty of bribery at the same election, and so defeat *his* claim to the seat. This is on the broad ground that no person shall reap the fruit of his own corruption, by becoming a candidate on the avoidance of the election where that corruption occurred. The same principle applies to, and the same rule therefore governs, the case of *electors* petitioning, if *they claim the seat* for such unsuccessful candidate, whose whole conduct is thereupon as effectually put in issue before the committee charged with the interests of the electors, as if he had himself besought the seat. This is allowed almost *ex necessitate rei*; because no counter-petition can be presented *against a petitioning* candidate: for it would not come within the statutory definition of an election petition under the Election Petitions Act, 1848, which, as we have seen,‡ is

* Ante, p. 242 et seq., Chapter XII.

† Post, 359, a.

‡ Ante, pp. 301, 2.

threefold only—a complaint of an undue *election*, or *return*; that *no* return has been made according to the writ; or of the special matter contained in *such* return. Now a petition against one who is not returned at all, of course comes under none of these three heads, and consequently is no election petition, and cannot be received by the House.

In the *New Windsor* case,* where this matter was fully discussed, and the principle, as will be presently seen, carried still further, the petitioner's counsel "*admitted* that no counter-petition can be presented against the pretensions of a petitioning candidate." If, therefore, it be not competent to give such evidence (technically called RECRIMINATORY† evidence), no means are furnished by law, of trying the question of due election, in the case under consideration. In the year 1833 this principle was acted upon by the then Speaker, Mr. Manners Sutton, afterwards Lord Canterbury. A petitioner‡ having unseated his opponent, was declared duly elected: but the Speaker asserted that a petition against him *then*, on the ground of want of qualification and bribery, was too late, as the evidence might have been brought forward before the Select Committee, by way of recrimination.§ The Speaker expressed the same opinion in a similar case, that of a petition against Mr. Blake, who had been seated by the Galway Town Committee.|| If, therefore, *the seat* be claimed by either the candidate, or by electors for him, that claim exposes him to evidence of bribery at the election. Nor can he escape from that liability if, after such a claim has been made, it be abandoned in opening the case before the committee. His petition, in which the claim was made, remains entire before the committee. Since he has there stated that he is entitled to be returned, as having the majority of legal votes, it is competent to the sitting member to show that his opponent is disqualified by bribery—especially since the effect of such evidence is not expended on the last election, but extends to future elections taking place in consequence of what has been proved at the trial where such evidence was offered.¶

* 2 Peckwell, 192 [A. D. 1804].

† This subject is discussed in the Chapter entitled PRACTICE, post.

‡ *Southampton*, P. & K. 237.

§ P. & K. 466, note (e).

|| *Id.* p. 467, note (e).

¶ *New Windsor*, 2 Peckwell, 191.

These reasonings, however, seem not to apply to the case of a candidate neither by, nor on the behalf of whom, any claim is made for the seat.* He is in no way amenable to the jurisdiction of the committee: he is no party before it,—neither as a petitioner, nor as one for whom electors claim the seat, nor as one who is, or can be, complained against by an election petition. They can therefore take no judicial notice of him or his doings: he is not *in esse* before them; and his doings are altogether irrelevant. If, on the seat being declared vacant, and a new election taking place, he again become a candidate, we have seen that in such second election, evidence may be given of bribery at the preceding one.

There is thus no way in which a candidate guilty of bribery at a former election, can evade the consequences of it so as to be eligible at the second, if any one, authorized to do so, bring the facts, by proper petition and proof, before a Select Committee.

It has been already intimated, in both the present and a previous chapter, that the statute which we have been discussing immediately proved so efficient, as to terrify all parties concerned in such gravely questionable proceedings at elections, as those at which it was aimed, into compromises, on almost any terms, in order to escape the formidable ordeal of a Select Committee. Their activity, however, was surpassed by the legislature; which in the very next year enacted, stat. 5 & 6 Vict. c. 102, by which the powers of a Select Committee were greatly extended, and placed, indeed, for the main purpose for which they were called into existence, on quite a new footing. This act, reciting that extensive bribery prevailed notoriously, and that the law was insufficient to DISCOVER it, declared it to be expedient that further powers should be given for that purpose, and for collecting evidence on which to found FURTHER PROCEEDINGS, in regard to PLACES where bribery should be found to have been generally or extensively practised. It then enacted that if, after the nomination of a committee for the trial of a petition charging bribery, either (1) *that petition*, or the charges of bribery contained in it—or (2) any *other* charge of bribery preferred before the committee, whether in *support* of a petition, or by way of *recrimination*, or in *answer* to any peti-

* *Aylesbury*, 2 Peckwell, 261; 1st *Southwark*, Clifford, 117 [A. D. 1796.]

tion—should be WITHDRAWN, ABANDONED, or not *bond fide* PROSECUTED before the committee—it should have authority to examine into the circumstances under which such withdrawal, abandonment, or forbearance to prosecute, should have taken place, and to ascertain whether the same had been the matter of COMPROMISE, AGREEMENT, or UNDERSTANDING, COVERT, or otherwise, in order to avoid the discovery of bribery; and to state, in their report to the House, any special matter relative to the abandonment of, or forbearance to prosecute, the charges:—and for more effectually discovering the truth of all these matters, the committee were empowered, “to examine, as WITNESSES, *subject to the ordinary rules of evidence*, the SITTING MEMBER OF CANDIDATE, and their AGENTS, and ALL OTHER PERSONS, concerning such withdrawal, abandonment, or forbearance to prosecute.”

This section is framed cautiously and comprehensively, and, as well as the whole act, is but an assertion of the inherent common law energy of the House of Commons, as expressed in the weighty passage quoted from Glanville in a previous page.* By virtue of this act, if a committee once acquire knowledge from any petition, or statement by counsel, or procedure by way of recrimination or otherwise, of an imputation of bribery, they are bound to follow it up; and will at once exercise the powers, and set in motion the machinery, created by the act, to defeat any attempt at withdrawing the facts from their cognizance. Their power of examining the parties—that is, either the sitting member or candidate—is subject to a two-fold limitation: first, they are to be examined only as *witnesses*, and are protected by all the ordinary rules shielding witnesses—e. g. from being required to answer questions tending to criminate themselves; secondly, the examination is to be confined to the withdrawing, abandonment, or forbearing to prosecute the charges of bribery. These limitations, indeed, apply to all parties whom the committee are enabled to examine.

It is next provided, that if any Select Committee—the case having been thus withdrawn from their cognizance—shall, in their report, recommend further inquiry regarding bribery at “such” election, the Speaker may nominate *an agent to prosecute* the investigation, and the same committee shall, within fourteen days after having made their report, re-assemble, with

* Ante, p. 417.

all their former powers, and inquire into the alleged bribery “at the said election”—and shall report to the House the result of their inquiries.

Then follows a still more extensive clause. Every petition, signed as required in an election petition, complaining of **GENERAL** or **EXTENSIVE** bribery at the then last, or **ANY PREVIOUS** election, presented *after* the time limited for presenting election petitions, *and within* **THREE CALENDAR MONTHS** next after the committing of some one or more of the acts of bribery charged—shall be inquired into by a committee to be appointed in all respects as an Election Committee: and such committee shall inquire and ascertain whether bribery was or was not practised “at the said election”—and shall specially report to the House as they may think fit.

The first thing into which the committee is then to inquire, is whether any of the acts of bribery were committed within three months next before presenting the petition: and unless satisfied that one or more had been committed within that period, they are to proceed no further with the matter of the petition.

If an election petition, charging bribery, be *withdrawn before the appointment of the Select Committee* for trying it,—any petition complaining of the prevalence of general or extensive bribery at such election, (if presented to the House *within twenty-one days of the notification to it* of the withdrawal of the first-mentioned petition, notwithstanding the period of three months since any of the acts of bribery were committed shall have elapsed,) will be dealt with as though the petition had been presented within that period: but neither the re-assembled, nor any committee appointed under that act, is to have any power **TO AFFECT THE SEAT, OR RETURN**, of any member, or the **ISSUING, OR RESTRAINING** the issue, of any **WRIT** for the election of a member.

The consequence of this last provision of the act is, that if its powers should succeed in eliciting proof of flagrant bribery by the sitting member, the only mode of dealing with such a case would be by a vote of the House itself.* The circumstances which led to the passing of this act afford an interesting and instructive commentary upon its provisions.

After the general election of 1841, a considerable number of

* Ante, p. 252.

petitions were presented to the House of Commons, complaining of gross bribery; and as to five of them, in the cases of Harwich, Nottingham, Lewes, Penryn and Falmouth, and Reading, a member (Mr. Roebuck), on the 9th May, 1842, informed the House that he had heard and believed that corrupt compromises had been entered into, in order to avoid the disclosure of gross bribery. Upon this the House ordered, on the 13th May, a Select Committee to inquire into the matter;* and on the 1st June, the borough of Bridport was added to those referred to the committee. On the 18th June was passed a short act (stat. 5 & 6 Vict. c. 31), indemnifying against “all penal actions, forfeitures, punishments, disabilities, incapacities, and all criminal prosecutions,” &c. &c. &c., all witnesses who might give evidence before that committee. The committee sat from the 23rd June till the 18th July, when they presented their report to the House; and amongst other paragraphs, it contained the following, with reference to the state of election law.

“Your committee desire to call the attention of the House to a part of the law of elections, which appears unsettled, if not defective. Two parties at an election, both being equally guilty of bribery, but one successful on the poll, and the other defeated, may experience a very different fate in consequence of the present state of the law. If the defeated candidate present a petition against the return of his successful opponent, and simply pray that the election may be adjudged to be a void election on the ground of bribery and corruption, but do not ask for the seat, he may unseat his opponent, and render him incapable of being again returned; but as he himself does not pray for the seat, it has in some instances been determined that a case of retaliation cannot be entered into as respects the petitioner by the sitting members. Thus the petitioner, though equally guilty, may again propose himself and be returned in consequence of the very bribery practised at the preceding election, and into which no inquiry was permitted.”†

With reference to *Nottingham*, the committee reported substantially that at the election, H. and L. were declared duly elected, the other two candidates, W. and C., having retired early on the day of polling, in consequence of which the votes given were very few—only 144 and 142, against 529 and

* 97 Journals, 268.

† *Sed vide ante*, pp. 468, et seq.

527. There were two petitions by electors on behalf of W. against the two sitting members, on the ground chiefly of bribery; and a third was presented by electors in the interest of the sitting members, to afford them the opportunity of making a counter case against the petitioners. The two petitions against the sitting members prayed for only a void election: and the third was consequently presented to let in the defence of retaliation. Between the appointment of the Select Committee and the trial of the petitions, a written compromise was entered into between the respective agents of the sitting members on the one part, and of W. (one of the defeated candidates) on the other. It was dated the 4th May, 1842; and reciting, merely—"It is expedient to settle the petitions now pending"—proceeded to provide—that all petitions should be abandoned; that within five days from that day one seat should be vacated; that within seven days from that day 1000*l.* should be paid to the agents of W., in consideration of the expenses incurred in the petition; that W. was to be returned at the election resulting from the above-mentioned vacancy; for security whereof, it was agreed, that fourteen specified gentlemen should not directly or indirectly oppose W.; that in addition, one of those specified should discourage all similar opposition on the part of certain other persons named;—and that a promissory note for 4000*l.* at one month's date, signed by the two sitting members, should be deposited that day with a London banker, to be handed to W. if the conditions were not honourably fulfilled, or returned to the sitting member if they were: the decision being left to two gentlemen named in the agreement.

The Report then proceeded thus:—

"The circumstances which induced the agents of the sitting members to enter into this agreement are stated to have been,
1. The fear that both sitting members would have been unseated for bribery and treating, committed by their agents.
2. And also the dread of the enormous expense that must necessarily have been incurred, with small hopes of success.

"The number of electors were about 5,400.

"The sum expended in the election, on the part of the sitting members, was £12,000.

"Of this sum a very large part was expended in an illegal manner; some in direct bribery, some in treating, and other

unlawful proceedings, without the personal cognizance of the candidates.

“The expenditure on behalf of the opposing candidates appears to have been about £4000 or £5000.

“The expense was thus comparatively small, because the poll was not taken; and it is stated that the bribery of the voters and other illegal practices in this interest were thus rendered unnecessary. It is clear that the system on the one side and the other was the same, which system arose in some of the preceding elections, and was particularly developed at that of April, 1841.”*

On the same day on which the committee agreed on their report, the chairman granted certificates of indemnity, in conformity with the act, to W., one of the petitioners, and to the agents for the sitting members and W. respectively. In pursuance of the arrangement, one of the sitting members, L., vacated his seat; at the new election W. became a candidate, and was opposed by a total stranger to the agreement, but returned. On this a petition was presented by the unsuccessful candidate, setting forth the proceedings above detailed, as a ground of disqualification of W., and also charging bribery and treating at the second election. On this second ground the election was avoided, W. being found guilty of bribery and treating, by his agents, but not with his knowledge or consent. The other ground of disqualification was abandoned; as the committee, giving full effect to the indemnity which had been given to W. and the two agents, refused to allow them to be examined, or the minutes of their evidence before the Committee of Enquiry to be read, or any document to be produced, on which W. had been examined before the Committee of Enquiry.†

Such is a specimen of the cases which led to the enactment of 5 & 6 Vict. c. 102.

In order, however, to prevent proceedings being taken under this act vexatiously or wantonly, it contains clauses providing that an ample security for costs shall be given by petitioners desiring to set in motion its powers. These provisions have

* Report from the Select Commission on Election Proceedings, pp. iii.—vii.

† Nottingham, Barr. & Arnold, 136—168. In this Report will be found, *in extenso*, all the proceedings of which an account is given in the text.

been already explained,* and it will be seen that the clue to them consists in the existence, or non-existence, declared by the committee, of REASONABLE and PROBABLE GROUND for the allegation in the petition.†

As to the practical operation of this act, it may be observed, that neither the seat nor return of any sitting member, nor the issuing nor restraining the issue of any writ, can be affected by any committee appointed under it; wherefore defeated candidates cannot be expected to undertake the responsibilities which attend proceedings under it. Nor is it likely that the electors will show much alacrity in instituting proceedings for the purpose of procuring their borough to be disfranchised. It may be for these or similar reasons, that the provisions of this act have not been called into active operation. In the year 1848, however, an attempt was made by a committee, but apparently without the slightest assistance from any of the parties before them, to avail themselves of the powers of the act.‡ The petition by electors prayed that the election and return might be deemed null and void, on the ground, *inter alia*, of bribery and treating; but the opening of the petitioner's counsel was stopped by the counsel for the sitting member admitting that the election must be avoided, as treating had undoubtedly taken place to a considerable extent, under the authority of the agents of the sitting member. The committee required proof, by one or two witnesses, in order to establish the fact, as a ground for their resolution. This was given, without interference by the sitting member's counsel; and the counsel for the petitioners then stated that he did not intend to prosecute the petition any further. On this the committee resolved, that the sitting member was not duly elected; that he had by his agents been guilty of treating; that the election was void; and "that with reference to an allegation contained in the petition, of the existence of *bribery* at the last election, the counsel for the petitioner now be requested, in accordance with the "[preliminary] resolution of the committee, *to produce the list of the names of the electors alleged to have been bribed*, and those of the persons who are charged with having given the bribes." On hearing this, the petitioner's counsel said, that though he had been prepared, ac-

* Ante, Chap. XV., *ad finem*, p. 300.

† Sect. 4, post, p. 269, A.

‡ 1st *Horsham*, Printed Minutes, *passim*; P. R. & D. 107.

according to his instructions, to substantiate by evidence the charge alleged in the petition, “yet having now, as counsel for the petitioners, obtained all that he had required, he withdrew from any further prosecution of the petition.” The chairman asked him whether the committee were right in inferring from what he had said, that he had been prepared to substantiate those charges of bribery? The petitioner’s counsel answered in the affirmative; on which the committee called in the agents, to “examine them as to any circumstances which may have led to *the forbearance to prosecute* the charges of bribery alleged in the petition,” and proceeded to do so under statute 5 & 6 Vict. c. 102, s. 1. The counsel on both sides assured the committee, in corroboration of the statements of the agents,—the counsel for the sitting member, that he believed there had been no *arrangements* between the parties; for the petitioner, that he had been fully prepared to contest the case throughout, and had not been aware, till he had entered the committee-room that day, of the course about to be taken by the sitting member. On this the committee resolved,—“that the circumstances attending the forbearance to prosecute the charges of bribery contained in the petition do not appear to the committee *to call for any special* report with reference to such forbearance.”

Without saying or suggesting more than that the statute 4 & 5 Vict. c. 57, has not been called into active operation, it may suffice to observe that ten years elapsed before the legislature again interposed, in the year 1852, by stat. 15 & 16 Vict. c. 57, entitled “*An Act to provide for more effectual Inquiry into the Existence of corrupt Practices at Elections for Members to serve in Parliament.*”• This act will be found generally explained in a previous chapter.† If a committee appointed to try an election petition, or one “appointed to inquire into the existence of corrupt practices in any election,” report that there is reason to believe that corrupt practices have extensively prevailed, or that they did prevail, in any county, borough, or university, at any election; both Houses may address the Queen thereon, who may, by warrant under her sign manual, appoint commissioners to inquire, *by lawful means* (s. 6), into the election in respect of which the committee may

• Post, p. 362, A.

† Ante, pp. 252 et seq., Chapter XII.

have so reported; or, if the report have extended to two or more elections, then into the *latest* of them: and if they find that corrupt practices were practised at that election, the commissioners are entitled to go backward “from election to election,” till they arrive at one in which no such corrupt practices prevailed: and there their inquiries are to end:—as though, in mining language, the commissioners had arrived at a *fault*, interrupting their further progress. They are to report, from time to time, to the Queen (and these reports must be laid before parliament) the evidence, and their conclusions on it; and, especially, *the names* of all persons who have been guilty of corrupt practices; as well those who have given, as those who have received BRIBES:—and the section delineating this course of procedure, in defining bribery or corrupt practices, combines all the phraseology contained in the several statutes respecting bribery, which have been considered in this chapter.

Such is the present bribery law of Great Britain; well nigh as stringent and searching as can be imagined. Its two great objects are, the protection of innocent constituencies, and the punishment of guilty ones, even to the point of blotting them out from the electoral system. Subordinate to these, are the detention and punishment of the individual agents in the work of corruption, whether as the bribed, or the briber: perpetually disfranchising both, on their being lawfully convicted of the offence; visiting both, in addition to disfranchisement, with heavy pecuniary penalties; and also in the case of the bribed voter—equally whether taking or only asking for a bribe—annihilating the particular suffrage which he had given under the corrupt influence of the briber.

The parliamentary consequences of bribery are determined by the Select Committee appointed to inquire into each particular duly-challenged election. They obliterate the faulty vote from the poll; declare the election of him who either personally, or by his agents unknown to him, has bribed a single voter, void; will seat his opponent, if he prove himself to be entitled to the seat; and declare nugatory the election of the briber standing on the vacancy occasioned by his bribery. Nay, in a particular class of cases, he is disabled from representing the electors of a place where he has practised bribery, for the entire parliament.

In addition to these disfranchisements and disabilities, most serious penalties are imposed on both parties to a bribe; and for the purpose of a Select Committee's detecting bribery, almost every ascertainable obstacle has been swept away, even as far as compelling the parties themselves to give evidence, or declare that they decline to do so, on the ground that their answers might criminate, or tend to criminate, themselves; and even that right, as will be shown in the Chapter on Evidence, has been seriously abridged by committees.

Finally, a SINGLE ACT OF BRIBERY will expose the briber, according to circumstances, to the following liabilities, penalties, and disabilities:—

First.—To an INDICTMENT at common law [*even for attempting to bribe*], with punishment by fine, or imprisonment, or both.

Secondly.—To a CRIMINAL INFORMATION, filed by order of the House of Commons; the punishment being the same as on a conviction for a common law misdemeanor.

Thirdly.—To an action for the penalty of FIVE HUNDRED, or, as the case may be, ONE THOUSAND, POUNDS, with full costs of suit.

Fourthly.—He is FOR EVER DISABLED from voting at a parliamentary election, “as though he were naturally dead.”

Fifthly.—He is FOR EVER DISABLED to hold, receive, or enjoy any municipal office or franchise, “as though he were naturally dead.”

Sixthly.—He is DISABLED from being elected or serving in parliament *upon the election* where the bribery was practised.

Seventhly.—He is INELIGIBLE as a candidate at the election ensuing that avoided by his own bribery.

Lastly.—He is disabled from serving IN THAT PARLIAMENT for the place where the bribery had occurred.

A firm and vigilant administration of the existing laws against bribery, in their recently-improved state, might supersede further legislative interference,—always, on both legal and constitutional grounds, to be deprecated, unless absolutely necessary: or if any alteration in that law were to be made, it might be worth considering how far it would be advantageous to add to existing enactments, the two following:—First, that every can-

didate declared guilty of bribery at an election of a member to serve in parliament, by a conviction in a penal action, indictment, or information, should, on a first conviction, be incapable for a period of ten years, and on a second conviction for ever afterwards, of sitting in the Commons House of Parliament; and secondly, that a resolution of a Select Committee, or other committee lawfully appointed in that behalf, of the House of Commons, specifying (as such committee, if warranted by evidence, should be enjoined to do) by name, a candidate as having been guilty of bribery, either personally, or by agents with his knowledge and consent, should be received on the trial of any penal action, indictment, or information, as sufficient *prima facie* evidence against such candidate.

CHAPTER XXII.

JURISDICTION OF SELECT COMMITTEES—CONTINUED.

TREATING.

THE thorough investigation of the law of bribery, which, it is hoped, may be found in the preceding chapter, is calculated to throw light on much of the conterminous subject of TREATING. It is, indeed, this conterminous character which seems principally to have occasioned uncertainty in the mode of dealing with either, but especially with the latter; committees sometimes giving to treating the effect of bribery, at others annexing to the latter, the consequences of treating: and occasionally dealing with each, as though there were no distinction between them. It is, however, treating, which seems surrounded with most practical difficulty. It has occasioned quite as much embarrassment to the legislature, in prescribing remedies for the admitted evils attending it, as to the tribunals charged with administering those remedies. It would almost appear, from the language recently used in parliament by the most eminent members of both Houses, as though there were something in treating too mercurial to be grasped—too slippery and subtle to admit of even definition. Thus, for instance, spoke the Earl of Derby, then Prime Minister, in the House of Lords:* “It is exceedingly difficult to deal with treating, and impossible legally to define it—and it would be better not to put it on a footing with what is a statutable offence,”—i. e. bribery. “While bribery is an offence well known to and punishable by the law, there is no legal definition, as far as I am aware, of the offence of treating, and certainly no punishment affixed to it by the law. Though there may be a description of

* Hansard. vol. 122 (3rd Series), 589, 14th June, 1852. Debate on the “Corrupt Practices at Elections Bill.”

treating as objectionable in character as bribery itself, yet there are forms of it entirely innocuous—free from all guilty tendency and all guilty intent. I think I may say with perfect confidence that there never has been a contested election for county, city, town, or borough, in the course of which there has not been committed, by some agent, some offence [act?] which might, by a committee of the House of Commons, be considered as treating." The fact of parliamentary committees having differed as to what amount of refreshment constituted bribery [treating?], shows how difficult it is to deal with such an undefinable offence.* "As to treating," said that great lawyer, Lord St. Leonards, then Lord Chancellor,† "no reasonable man could put it on the same footing as bribery. There ought to be some provision against treating, provided that it did not strike at the foot of fair and legitimate treating [refreshment?]" "The subject of treating," observed Lord Brougham,‡ "is one most difficult to be dealt with. Treating is the colour and the shift for bribery. I recollect being concerned, many years ago, in a contested election where the *currency* was in *beer* tickets; and on 'speaking of the enormous expense incurred for treating,—that is, for bribery, under the form of treating,—amounting to 50,000*l.* or 60,000*l.*, I was told it was much worse on the other side of the estuary—since there the tickets were for *wine*!" But why should we prevent a man, who comes a great distance to record his vote, from partaking of some trifling refreshment?" Earl Grey§ said—"It is perfectly true that there is a great difference of opinion on the subject of treating. I think it would be very hard to deprive a member of his seat, because he gave some trifling refreshment to the electors: but the practice is blameable, inasmuch as it is capable of considerable extension."

Similar declarations were made, a few days afterwards, by the leading members of the House of Commons. Lord John Russell|| observed, that, "in some cases, the treating is of so small an amount, that it is obviously simply for the purpose of refreshing parties, who may have come from distances to record

* Hansard, vol. 122 (3rd Series), 569, 589, 14th June, 1852.

† Ditto, 579.

‡ Ditto, 576.

§ Ditto, 589.

|| Hansard, 122 (3rd Series), 1303, 25th June, 1852.

their votes; whilst, in other cases, it is so gross, as to be as corrupt as bribery.” He afterwards said, that “treating may include offences of very dissimilar magnitude; and it is possible that there may be cases of treating quite as bad as any form of bribery and corruption.”* Mr. Aglionby† declared, that “it appeared to him that treating was *worse* than bribery. Many members of that House would hesitate to give *money* to a voter, who would not hesitate to throw open public houses, and give voters as much as they could drink. Many electors, also, who would shrink from taking a sovereign, would partake of eating and drinking.”

Such being the views of members of the legislature, in both Houses, and of all parties, expressed in their legislative capacity on a grave occasion, those varying views reflect the opinions prevailing out of doors: and if so, it cannot be a matter of wonder that the decisions of Select Committees are not uniform in dealing with the same or similar facts; and that consequently the decisions of any one of these tribunals, as to what does or does not amount to treating, is very problematical.

Suppose, for instance, a candidate's agent were to ask into his house an elector who had walked ten miles to record his vote for that candidate, and were to give him a glass of wine and a biscuit, either before or after he had polled: is that fact alone an act of treating, which will avoid the election—and not only do that, but disable the agent's principal from representing that particular constituency throughout the parliament? Suppose, again, the agent were to act similarly towards six voters, or even twelve: would *that* be attended with such disastrous consequences? Or suppose the agent were to request one—or six—or twelve voters, under such circumstances, to repair to an hotel, where they would find provided for them moderate refreshment? Or suppose the number extended to twenty, fifty, or a hundred? or several hundreds? Where is the line of illegality?

Suppose, again, a zealous and active friend, but not an accredited agent of the candidate, were, without his knowledge, to open his own house for the purpose of giving breakfast, luncheon, dinner, or supper to ten or to fifty voters, or to only one or two? Ought his doing so to have any effect prejudicial

* Hansard, vol. 122 (3rd Series), 1310, 25th June, 1852.

† Ditto, 1309.

to individual votes, or to the election generally, and the candidate so deeply interested in its validity ?

Such are the questions, but under ever varying circumstances, which fall from time to time under the adjudication of a Select Committee ; who have to decide on each occasion—*Treating*, or *No Treating*.

On perusing the opinions expressed, as above, in both Houses of parliament, it will be seen that the minds of all the speakers are settled on the possible effect and tendency of innocent acts, as shown by the facility with which they may be abused, if any degree of toleration or recognition of them be evinced by parliament, or the legislature. How easily 'some trifling refreshment,' to a wearied voter, may gradually expand into organized corruption of a constituency, and the exhibition of scenes disgraceful to a civilized community, converting a great and grave electoral act, into a caricature and a farce ! Difficult, however, though it may be to do so, the line must be drawn *somewhere* ; but it is expedient that such line should not be uniformly visible, to those whose ingenuity would be ever at work to escape from it with impunity. Provided it be drawn with sufficient distinctness to be perceptible, on any given occasion, to an enlightened judicial tribunal, consisting of men experienced in the affairs of the world, that will suffice for the practical purposes of legislation and judicature : and the benefits obtained by it will far outweigh any inconveniences which may be alleged to be experienced in consequence of electors and candidates being unable to see precisely what acts are, or are not, within the line of illegality. Honourable candidates will have greater inducements to select honourable and prudent agents to conduct the election ; while those who contemplate having recourse to illicit means for obtaining success, will feel themselves irresistibly checked and crippled by the fear of gaining, only to lose, their object.

The true clue for a Select Committee, in the case of treating, is, as we have said in the case of bribery,* to consider the effect of the questioned acts upon the *minds* of individual voters, or classes of voters, or it may be, an entire constituency : whether what has been done has vitiated the mind of the elector, and disabled it from making a FREE and INDIFFERENT choice of a member to represent him in parliament.

* Ante, p. 424, 435.

The word 'treating' does not occur in Lord Coke's writings, nor in Whitelocke; nor in Blackstone's Commentaries; nor in Doctor Johnson's Dictionary, as applicable to elections: nor in any of the statutes relating to elections, till the year 1842, when it was used in the 22nd section of statute 5 & 6 Vict. c. 102, which recites that statute 7 Will. 3, c. 4, had been "found insufficient to prevent corrupt TREATING at elections:" the title of the act being, moreover,—“An Act for the better Discovery of Bribery AND TREATING at the Election of Members of Parliament.”* The section in question proceeds to adopt the words “*meat, drink, entertainment, or provision,*” —used in the statute 7 Will. 3, c. 4; which the 22nd section of the statute of Victoria recites that it was “expedient to *extend*, for the purpose of preventing corrupt TREATING at elections.” In the latest act on the subject, stat. 15 & 16 Vict. c. 57,† the word does not appear, though the professed object of the act is “to provide more effectual inquiry into the existence of *corrupt practices* at elections for members to serve in parliament.” As originally framed, however, and on its reaching the Lords, the bill contained a provision extending the inquiries of the commissioners who may be appointed by virtue of it, as to “whether any corrupt practices by way of TREATING has been carried on at any such election.” The Lord Chancellor, however, for the reason assigned by himself and the Earl of Derby, as mentioned at the commencement of the present chapter, moved the exclusion of the words: saying, “that he would propose that treating should not form part of that bill, *but be made the subject of a separate measure.*”‡

Thus, then, we have, at length, a legislative recognition of the word 'treating,' as descriptive of certain acts prohibited by the two statutes of William & Mary, and Victoria; and we may now thus venture to define this hitherto “undefinable” offence.

TREATING IS THE SUPPLYING MEAT, DRINK, PROVISION, OR ENTERTAINMENT, FOR THE PURPOSE OF CORRUPTLY INFLUENCING OR REWARDING VOTERS.

And this treating may avoid either a single vote, or any number of votes; or the entire election; or disable a candidate from sitting for the place at the election where it was practised,

* Post, p. 268, A.

† Post, 362, A.

‡ Hansard, 122 (3rd Series), col. 579.

or being returned at that ensuing the avoidance of it through treating; or for even the whole parliament. It is obviously, therefore, of as great importance to consider carefully the whole law of treating, as that of bribery; and in doing so, to keep as distinctly as possible before the mind's eye, the difference between the two offences, and the parliamentary incidents annexed to them. When the "parliamentary" incidents are mentioned, it is designed to indicate that there are no pecuniary penalties annexed to treating, as there are to bribery: but it appears superfluous to state, that to do acts forbidden, as is treating, by the statute law, is a misdemeanor punishable by fine or imprisonment, or both.

It may be safely stated, that TREATING, as a parliamentary offence, is now to be regarded as a STATUTABLE offence; but in order to aid in putting a proper interpretation upon the language of the legislature, it will be useful, and certainly interesting, to glance at the apparent occasion of its first interference, in the year 1695.

Whether or not treating was an offence at common law, is a question which may be answered out of Whitelocke,* than whom there cannot be adduced a better authority. Most learned and eminent himself as a parliamentary and constitutional lawyer, his own opinion is alone entitled to great weight; and when we consider that his standard work on the King's Writ was drawn up very elaborately, and based on such authorities in the law as Selden, Lambard, Coke, Owen, and Spelman,† it is entitled to the utmost respect. It has been seen that he bears conclusive testimony to the fact that *bribery* was a common law offence, entailing the loss of the seat which it had procured;‡ and in the chief passage stating that "the law of parliament forbade giving money or rewards to freeholders to obtain their suffrages," he adds the decisive words, "*it were well if it extended to drinke and intertainments.*" The law of parliament, therefore, in the year 1645-6, did not forbid 'drink and entertainments, nor class the giving them among "bribery and corruption, and other heinous crimes."§ In the year 1669, during Whitelocke's lifetime, a bill was brought into the House of Commons, "to prevent abuses *and extravagancies* in electing members to serve in parliament, and for regulating

* Ante, p. 454.

‡ Ante, pp. 454, 455.

† 1 Whitelocke, Ed. Pref. xi.

§ Id. p. 455.

elections.”* After a long debate, touching the “making void of all future elections which should appear to be procured by money, or by entertainments of meat and drinke,” it was laid aside, but not till after it had been read a second time.† Eight years afterwards, however, viz. on the 2nd April, 1677, in proof of the sense entertained by the House of Commons of the necessity which existed for putting some check upon the growing evils of extravagant and profligate expenditure at elections, the House passed the following Resolution, shortly afterwards made a Standing Order. It is to be remembered, that at this time there was no constitutional limit to the duration of a parliament, but the will of the crown. The Triennial Act (6 W. & M. c. 2), did not pass till the year 1694. In order to appreciate the tenor and scope of the Resolution, it may be well to glance at the contemporary history relating to it. The ordinary mode of bribery in modern times is, *per capita*, by the payment of money at so much a head for each vote; but the custom formerly was to give a sum of money to the returning officer to make a false return,‡ or to give a gross sum of money to the borough. This money was expended in a system of general debauchery and corruption; and it has been said that this was the mischief at which the resolution was, at all events chiefly, aimed: that the gift prohibited was one of a general character, and made in order to procure a corrupt return.§

“Resolved, that if any person, hereafter to be elected into a place for to sit and serve in the House of Commons, for any county, town, port or borough, after the teste or the issuing out of the writ or writs of election, upon the calling or summoning of any parliament hereafter; or, after any such place becomes vacant hereafter, in the time of parliament, shall by himself, or by any other in his behalf, or at his charge, at any time before the day of his election, give any person or persons, having

* 9 Journals, 100.

† Mr. Tierney’s argument before the committee in the *Second Southwark* case [A. D. 1796], Clifford, 157. Mr. Tierney was the petitioner, and argued his own case against Mr. Thelluson, and successfully.

‡ *Evesham*, F. & F. 514 (*arg.*)

§ On the 22nd of April, 1755 (Journals, 27, p. 290), a “complaint was made to the House that an attempt had been made to influence the returning officer for the borough of Milbourn Port, in making a return of a member to serve in parliament for the said borough, by the offer of a sum of money to be deposited for that purpose.” See Heywood on Borough Elections, p. 84.

vote in any such election, any meat or drink, exceeding in the true value of ten pounds in the whole, in any place or places but in his own dwellinghouse or habitation, being the usual place of his abode for six months last past; or shall, before such election be made and declared, make any other present, gift or reward, or promise, obligation or engagement to do the same, either to any such person or persons in particular, or to any such county, city, town, port, or borough, in general; or to or for the use and benefit of them, or any of them; every such entertainment, present, gift, reward, promise, obligation, or engagement, is by this House declared to be **BRIBERY**: and such entertainment, present, gift, reward, promise, obligation, or engagement, being duly proved, is and shall be sufficient ground, cause and matter, to make every such election void, as to the person so offending, and to render the person so elected incapable to sit in parliament *by such election*: and hereof the committee of elections and privileges is appointed to take especial notice and care; and to act and determine matters coming before them, accordingly.”*

“Resolved, that the said order against *excessive drinking* at elections be a further instruction to the committee of elections.”

In this resolution, the punishment of treating is described in nearly the same words as that of bribery, by Whitelocke. Two years after the passing of this resolution, viz. in 1680, a bill to prevent the offence of “bribery and *debauchery*” at elections was brought in and read a second time,† but followed the fate of its predecessor. In 1681 the following striking entry appears on the Journals of the House, indicating its desire to go even out of its way to applaud those constituencies who, steering clear of corruption, had returned their members freely and without charge, according to the ancient constitution of elections.‡ “It being represented to this House that several counties, cities and boroughs have freely, without charge, elected many of the members in this present parliament, according to the ancient constitution of elections of members to serve in parliament, wherefore the House doth give their thanks to such counties, cities and boroughs for the said elections.”

* Resolutions, 2nd April, 1677; Journals, vol. ix. p. 411, col. 1. Made a Standing Order, 21st October, 1678; Id. p. 517.

† 9 Journals, 659.

‡ See *Second Southwark*, Clifford, 161, Mr. Tierney, *arg.*

On the 28rd October, 1689, was read a first time “A Bill to prevent Abuses occasioned by *excessive expenses* at Elections.”*

About this time it was usual, when an election had been obtained by corrupt practices, not only to deprive the guilty candidate of his seat, but also to punish the electors by allowing no writ to issue for a new election, until they should have repented of their crimes, and the corrupt influence created had so far died away, as to admit of a fair and impartial election.

At length, in the year 1695, immediately after the passing of the Triennial Act, the statute 7 Will. 3, c. 4, received the assent of the legislature; its title, as we have already seen, being “An Act for preventing *Charge and Expense* in Elections,” and its recital, that ‘grievous complaints were made of undue elections, by excessive and exorbitant expenses, contrary to the law, and in violation of the freedom due to the election of representatives for the commons of England in parliament, to the great scandal of the kingdom, dishonourable, and may be destructive to the constitution of parliaments.’ Some account has already been given of the progress of the act through the two Houses.† It has been placed before the reader as far as its provisions concern the offence of bribery, as contra-distinguished to those levelled at treating, as it was then, and has ever since been, understood. The latter provisions will be presently dealt with in like manner.

The following is, *in extenso*, the first of the two sections constituting the statute. It will be found to be purely prohibitory; the disability attached to a disregard of it, being contained in the second section.

“Be it enacted and declared, that no person or persons hereafter to be elected to serve in parliament for any county, city, town, borough, port, or place,” &c. “after the teste of the writ of summons to parliament, or after the teste or the issuing out or ordering of the writ or writs of election upon the calling or summoning of any parliament hereafter, or after any such place becomes vacant hereafter, in the time of this present or of any other parliament, shall or do hereafter, *by himself or themselves, or by any other ways or means on his or their behalf, or at his or their charge*, BEFORE his or their election, to serve in parliament for any county, city, town, borough, port, or place, &c. “directly or indirectly give, present, or allow to any per-

* 1 Peckwell, 193.

† Ante, p. 456.

son or persons *having voice or vote in such election*, any money, meat, drink, entertainment, or provision, or make any present, gift, reward, or entertainment, or shall, at any time hereafter, make any promise, agreement, obligation or engagement, to give or allow any money, meat, drink, provision, present, reward, or entertainment, to or for any such person or persons in particular, or to any such county, city, town, borough, port or place in general, or to or for the use, advantage, benefit, employment, profit, or preferment of any such person or persons, place or places, in order to be elected, or for being elected to serve in parliament for such county, city, town, borough, port or place.”

It is to be observed generally, first, that the word **BRIBERY** does not, any more than the word **TREATING**, appear in this statute, though it did in the Resolution of the 2nd April, 1677, on which it was founded. It was said in the *Durham* case,* that the word bribery was “purposely omitted in the statute, in order that treating and bribery might not be confounded, and that the former might be known as a substantive offence, independently of any corrupt motive which might, or might not, accompany the commission of it.” Whether there be any force in this conjecture, seems practically immaterial ; since, although the very word be not used, the thing which alone it signifies, appears in the act as distinctly as words can express it.† A second observation may present itself, that this statute being, as already proved, a declaratory one,‡ it must, equally as in the case of bribery, declare that an undue election by “excessive and exorbitant expense”—and by means of “meat, drink, entertainment, or provision”—was, as the act states, at the time, “contrary to the law”—that is, to the common law. In the case of *Hughes v. Marshall*,§ Lord Lyndhurst, in delivering the judgment of the court, expressly stated, that “to furnish provisions, with a view to influence an elector, would be illegal at common law :” but he adds, “if *bribery* be brought home to the party, he is guilty of an offence at common law :” and the judgment in that case, proceeded explicitly upon the ground that “there was nothing to show that *bribery* had taken place

* Ante, p. 456 ; 2 Peckwell, 183 [A. D. 1804].

† Ante, p. 427, where the words applicable to bribery are taken out of the statute, and put together connectedly.

‡ Ante, p. 427.

§ 2 Cr. & Jer. 121 ; ante, p. 427.

to influence the election.” That great judge also noticed the fact, that “the *expenses*,” in the case before the court, “*were inconsiderable, when compared with the number of persons who shared the refreshments.*” This observation seems to point to the true distinction : that previously to the statute of William, treating a particular voter, by meat, drink, entertainment, or provision, was only so far an offence at common law, rendering an election voidable on petition, as it amounted to bribery. Where a corrupt contract for the vote was entered into, the form of the consideration was a matter of indifference : it might be money, or money’s worth, in the shape of meat, or drink, or both. Treating, in any other sense, was applicable to those cases only, where, in the language of the act, “excessive and exorbitant expenses” had been incurred, rendering the place or scene of it *generally* corrupted, and the result of the election ‘unduly influenced.’

In the same year in which this act was passed, it was called into operation, in the case of *Aldborough*, on the petition of one *Kaye*, stating that Henry Fairfax, in contempt of an act of last session of parliament, publicly spent money in treating the electors for their votes, and thereby procured himself to be returned. The House resolved, *nemine contradicente*, that Henry Fairfax, Esq. having, contrary to the late act of parliament, expended money in order to his election to serve in the present parliament for the borough of Aldborough, in the county of York, since the vacancy thereof by the death of Sir Michael Wentworth, is disabled and incapacitated, upon such election, to serve as a burgess for the said borough ;” and it was resolved, “that the election was void,”* and they went the length of disfranchising the borough, and allowed no writ to issue for a twelvemonth, nor until they had received a petition from the electors, expressing their sorrow for the offence, and promising never to suffer any irregularities in any future elections for their borough, but strictly and faithfully to observe so good and beneficial a law.”†

The *Thetford* case was, in some respects, remarkable. It occurred three years after the passing of the act, and was decided by the very gentlemen, as Mr. Tierney remarked,‡ who

* 11 Journals, 599, 632 ; Clifford, 168.

† 12 Journals, 19 ; Clifford, 169.

‡ *Second Southwark*, Clifford, 169.

had passed it, and on a day expressly set apart to consider the construction of the act. The petition complained of the undue return of Mr. Sloane for the borough of Thetford, on the ground of *treating, alone*. After a full debate, and by the narrow majority of five (115 to 110), the House avoided the election, and ordered a new writ. On the second election, Mr. Sloane again stood, and was again returned. The House took notice of the fact, *proprio motu*, before any petition had been presented; and resolved, "That the House would on Saturday next, *in a full House*, take into consideration the act for preventing expenses at elections:" and Mr. Sloane was ordered to attend in his place on that day. Two days afterwards, his opponent presented a petition against him, stating that he had been *incapacitated* to sit in the House, and that the petitioner had been duly elected. This petition was ordered to lie on the table till the day appointed by the House for considering the construction of the statute. On that occasion, the petition was read; Mr. Sloane was heard in his place, and then withdrew; on which a debate arose, and the question as to Mr. Sloane's being "capable of serving in this *present parliament* for the said borough" was negatived by a majority of thirty-two votes (144 to 112). They came to no decision on the petition, but referred it, in the usual course, to the Committee of Privileges, to be dealt with according to law.* In this case, it will be observed, that the House construed the words "incapacitated upon such election to serve"—as meaning,—incapable of serving during the continuance of the same parliament:—an extension of the words which no subsequent committee has adopted, and which undoubtedly it seems somewhat difficult to support.

Mr. Shepherd has observed,† that "committees have formerly decided in the opposite *extremes*, upon the effect of the Treating Act. In the *Thetford* case, it was held a disqualification for a particular borough, during the continuance of the same parliament. In the *Second Norwich* case, it was held not even to affect the candidate on *the immediate vacancy*." Before concurring in this latter opinion, it is necessary to examine somewhat carefully the *Second Norwich* case. It occurred in the year 1787; and it has been stated that seven professional men

* Journals, xiii. 134, 145, 223, 225, 251.

† Election Law, p. 61 (2nd ed.)

sate on the committee.* The case was, moreover, argued ably and elaborately, and the committee appears to have acted, throughout, with complete judicial temper and discretion.

At the *First Norwich* election, there had been three candidates for a single vacancy, Hobart, Beever, and Burton. The first was returned by a majority of sixty-seven votes, and the second† petitioned against that return, on the ground of bribery, treating, rioting, abduction of voters, and the improper admission of unqualified, and the rejection of qualified, voters. Two hundred and sixty-two votes were objected to on a proposed scrutiny, which was, however, abandoned, from the length of time—"some weeks"—which it would occupy, and the illness of a principal official witness to support it:—and the evidence was restricted to the grounds of bribery and treating; the sitting member retorting the latter charge on the petitioner (the unsuccessful candidate). The petitioner's case lasted for a fortnight, and the sitting member's for a week: at the close of which the committee resolved that neither the sitting member nor the petitioning candidate had been duly elected, and that the election was a *void* one. On this a new writ was issued; which, after stating that "the election of the sitting member *was adjudged to be void*," commanded the sheriffs, "that, in the place of the said 'sitting member,' they should cause to be elected *one other* fit person."§ At the second election, the sitting member and petitioner were again candidates, and the former was again returned, and by a majority of eighty votes. He was again petitioned against by his former opponent, on the ground that having been on the former occasion declared not duly qualified, on a petition, "the evidence in support of which had been confined to the bribing and entertaining electors," the petitioner "conceived" that the sitting member was thereby "rendered incapable to represent the city of Norwich in parliament, *at any election to fill the said vacancy*." It was contended for the petitioners, that the evidence had been confined to the bribery and treating—the other charges having been formally and effectually abandoned: and that the evidence must then be taken to have referred exclusively to the remaining allegation of the petition as

* Pickering, 41, note (3).

† 3 Luders, 441.

‡ Electors also petitioned in the same terms.

§ 3 Luders, 457.

to bribery and treating. The minutes of the former proceedings were tendered, not as evidence of the truth of the facts, but to show the grounds on which the committee had proceeded, and thereby establish the allegation, in that respect, contained in the second petition:—and evidence was to be again offered to prove the fact of bribery and treating at the former election. It was admitted that no notice of the disqualification and ineligibility of the sitting member had been given to the electors, and that any votes given for him would be thrown away,—because they had been parties to the former decision, by the petition then presented “on behalf of themselves and the other electors”—and must, therefore, be presumed to know, and bound to take notice of it; and must be consequently considered to have thrown away their votes. To this the sitting member’s counsel answered, that the petition contained no *charge* expressly and directly affecting him with an offence entailing the incapacity contended for: it did not allege that he had *done* anything to render himself incapable, but that others had *said* that he had; nor is their assertion alleged to be true. It was replied, that whatever the *form* might be, the petition did in substance accuse the sitting member of bribery; for it stated “that he *was disqualified* by it.” The committee resolved that the petition did contain the charge, and that the petition should proceed: but that if *vivâ voce* evidence should be offered of the bribery and treating at the former election, it would be held *irrelevant* “to the subject-matter of the petition.” When the former *petition* was offered in evidence, it was objected to, but, on full argument, received: and a similar course was taken, with a similar result, where the *minutes* were offered in evidence. They consumed a full day, and part of another, in reading; and with them the petitioners closed their case. No evidence was offered on the part of the sitting member;* and the petitioners proceeded to argue the case; contending that the two petitions in the former case, the evidence in the minutes, and the judgment of the committee, were to be considered as an entire record—and that that judgment was, according to the *allegations and proofs* (*secundum allegata et probata*), against the sitting member, on the grounds of bribery and treating; and that one whose seat had been so avoided for that breach of

* 3 Luders, 477.

the law, was incapable of being elected again to supply the vacancy. All the decided cases were then cited and commented on, commencing with that of *Thetford*: and it was powerfully urged, that were it to be held otherwise, a bribing and treating candidate unseated on the immediate election, would be sure of reaping the fruits of his guilt on the immediately-ensuing one,—“he might bribe and treat openly and notoriously—only hinting to the electors that they must go through the form of polling twice for him, instead of once.” It was then argued that the words in the statute “upon such election” meant a *real* and *efficient* election, not a *corrupt attempt* which destroyed itself in the very act.

The sitting member’s counsel contended that the petition contained no direct *charge* against him; that the proofs of it were insufficient, and that if the charge were proved, the petitioner was not entitled to the relief prayed for—viz. that the sitting member should be considered to have been disqualified from sitting on that election. The present petition alleges that no charges but of bribery and treating were proceeded upon before the former committee: yet three witnesses had been examined to prove the illegal and forcible detention of thirteen voters from voting: and “it were only *possible* for the former committee to have believed that evidence, so that it might in possibility have affected their determination,” it was enough to defeat the petitioner’s present argument. It was then urged, that to construe the words “upon such election,” as extending beyond that depending, and in which the illegal acts were committed, would be to deal with facts, not as they were at the time, “but as they might possibly fall out by matter *ex post facto*.” As to claiming the seat for the petitioner, that was out of the question—for that there had been no disqualification by the former committee of the sitting member, more than of the petitioner—and that no notice of any alleged disqualification had been given to the electors. To this it was answered, that the petition entitled the petitioner to rely on both the common and statute law against bribery—as it alleged that the election having been declared void, “on the ground of his having violated the *acts* of parliament against bribery and entertaining the electors, he was thereby, *and according to the law and custom of parliament*, rendered incapable of serving for such election.” That if the proceedings on the former elec-

tion left no doubt as to the general effect of them, the committee ought to form *their* opinion, then, accordingly. “It could not be supposed, that because a little evidence on another *immaterial* subject happened to be mixed with the general evidence, where its effect could not reach one vote, such evidence had affected the deliberation of the committee—or that their decision had not flown from the *material* evidence of the cause”—that it rested therefore entirely on the evidence of bribery and treating, either of which would cause the incapacity contended for.

The committee, after hearing these arguments, resolved—“that the sitting member *was duly elected*,” of which the chairman duly informed the House.* The learned reporter, however, adds, that the chairman of the committee informed him, that previously to this determination, the following resolution had been “*passed unanimously* :”—“that it does not appear to the committee, from the minutes, that the last committee adjudged the seat void, on the effect of any other evidence than that of treating :”—and that the following resolution was “*negutived* :”—“that the disqualification by the statute of 7 Will. 3, c. 4, so far as the same relates to treating, is *prospective to a future election*.” The reporter adds, however, “I do not find that these resolutions were ordered to be entered in the Minutes.”† This is a full account of the facts, reasoning, and decision, in the celebrated *Second Norwich* case. In commenting on it, in his masterly argument in his own behalf before the *Second Southwark Committee*, in 1796,‡ Mr. Tierney bitterly ridiculed the two quasi “resolutions” above mentioned, as “a most whimsical tailpiece,” declaring as to the former, that “if this singular resolution had been *unanimous*, it was no wonder that the committee could not be persuaded to announce it to the parties, insert it in the Minutes, or report it to the House :” and as to the second, “it was more extraordinary than the former : its best answer was its absurdity, and contradiction to all parliamentary precedents : that there was no real evidence of either resolution having been passed : they were extra-judicial—and never reported to the House, nor in any way acted upon, nor properly authenticated :” and he “lamented” that by chronicling such absurdity “this *ignus fatuus* should have been held forth to

* 42 Journals, 736.

† 3 Luders, 499, 500.

‡ Clifford, 200.

mislead and to misguide the public.” As to the official decision of the committee, he contended that as “no special report had been made, it was impossible to decide on which of the varying allegations in the petition the committee had determined, or whether their judgment might not have been in some measure influenced by them all :” the second committee were therefore at sea, and completely at a loss how to guide themselves : and that their reference to the minutes of the former committee was absurd, as there had been evidence on different charges : what light could the minutes cast, on the motives which had actuated the committee in making their decision ? Could the clerk infuse into the page the blush of a perjured, or transcribe the hesitation of an unwilling, witness ? Yet these circumstances had been as necessary to enable them to form their judgment, as the evidence itself.”*—“It was impossible for any man who read the minutes of the first Norwich Committee to say, that the evidence of several of the electors having been confined to prevent[ing] their voting, had no effect in determining the judgment” of the committee. The whole that appears on the Journals as to that committee is, that it determined that neither the sitting member nor petitioner was duly elected : and that the last election was a void election. It appears, finally, that the sitting member was twice elected, and twice petitioned against ; that his former election was avoided, and his latter confirmed. This is the whole upon the subject that is to be found either in the Journals of the House, or on the minutes of the two committees : and was “therefore,” said Mr. Tierney to the committee, “the whole that *you* have a right to know.”†

This often-cited case is, undoubtedly, open to these latter, if not, indeed, to all the remarks of Mr. Tierney ; and affords a strong illustration of the consequence of that defective administration of election law, which has deprived of all value as precedents, so many decisions of committees, inasmuch as they have not specified the precise ground out of several which had been urged before them with equal strenuousness, on which they declared an election void, or a member to be, or not to be, duly elected. In this respect, the *Second Norwich* case in 1787, and the *Dungarvon* case‡ in 1834, stand on the same footing.

In spite of the supposed “unanimous resolution” of the for-

* Clifford, pp. 197, 198.

† Id. p. 199.

‡ Ante, p. 449, note *.

mer committee, we are not warranted in attaching any weight to it, consistently with established legal principles. All we *know* is, that a court of competent jurisdiction solemnly adjudged the sitting member duly elected; and that they thought proper to assign no grounds for their decision. The fact of the "unanimous resolution" no where authentically appearing, annihilates its authority, and justifies the conclusion that it was repudiated by those who are imagined to have at one time entertained the opinion which it embodies. If this be so, the *Second Norwich* case, proceeding as it did from so competent a body of judges, ought not to be cited as a *conclusive* authority, that they held that a former resolution against the sitting member for treating, worked no disqualification under the statute of William III. If, however, we be justified in asserting that this committee did really act exclusively on the ground that its predecessor had avoided the former election for treating only, then the decision of the *Second Norwich* Committee is undoubtedly an authority for the position that treating at a former election, does not disqualify the unseated candidate for standing at the election to supply the vacancy.

The next case to be examined is that of the *Second Southwark*, in the year 1796, which has been already alluded to.* The antagonists in that and the *First Southwark*† cases, were Mr. Thelluson and Mr. Tierney. On the former election, Mr. Tierney petitioned against his successful rival, on the ground of treating; setting forth in his petition the standing order of 21st October, 1678,‡ and the statute of 7 Will. 3, c. 4. The committee resolved that Mr. Thelluson was not duly elected: that the election as to him was void; and that he "did, at that election, act in violation of the stat. 7 Will. 3, c. 4; whereby he is incapacitated to serve in parliament upon such election."§ On this the House ordered "a *new writ* to issue for the electing a burgess in the room of the said G. W. Thelluson, whose election for the said borough had been determined to be void." He nevertheless stood again, as also did Mr. Tierney; but the former was again elected, notwithstanding due notice given by the latter to the returning officer, and the electors, of his opponent's incapacity. Mr. Tierney again petitioned, setting forth all the facts relating to the former committee, and its decision,

* Clifford, 131.

† Ante, p. 504.

‡ Id. 1.

§ Clifford, 79—81.

disqualifying Mr. Thelluson; and also alleging various other grounds for avoiding the election, declaring that the petitioner had the majority of legal votes, and ought to have been returned. Before the committee, however, he abandoned evidence to show that he had the majority of legal votes,*—in other words, the scrutiny; the charge of specific bribery,† as “he could not bring it home directly to Mr. Thelluson.” But he adhered to other charges of illegality affecting the election in respect of acts done at it. His great point was, “whether a person, with a conviction for bribery and treating staring him in the face, and before the record of it is dry, shall be allowed to return, as a candidate, to the scene of his offences, and there reap the benefit of his former corruption.‡ You have in court the record of his conviction. There needs no further evidence to avoid this election. Can such a person be ‘one of the most FIT and DISCREET?’ Can he be said to be ‘FREELY AND INDIFFERENTLY chosen?’ Having proved his ineligibility, I must show that, previous to the commencement of the poll, I gave to the electors sufficient notice; and then, by the law of parliament, I must be declared the sitting member.”§ Proof having been given of the resolution of the former committee, and the notice of it to the electors, Mr. Tierney closed that part of his case; and Mr. Dallas (afterwards Chief Justice) addressed the committee for the sitting member: stating that “the only question to be determined was—whether, by TREATING the electors of Southwark at the former election, Mr. Thelluson was incapacitated from standing for parliament upon an election which took place in the December following? || That the only point in the case was, whether under the statute of 7 Will. 3, c. 4, an incapacity to serve in parliament, attaches as a consequence of treating?” He admitted that by statute, treating as much avoided an election, as bribery did at common law. When did treating first become

* Clifford, 145.

† Id. 146.

‡ Id. 149.

§ Clifford, 151, 152. Mr. Tierney admitted, in conformity with the intimation offered by the author in a previous *page* (ante, p. 463), that had the other sitting member died, on a writ issuing to supply *that* vacancy, Mr. Thelluson might have been eligible, “because his treating would have been prior to the issuing of, and was not given with a view to being elected under, *that* writ.”—Clifford, 212.

|| Id. p. 228, 229.

illegal, and avoid an election? When was a person, whose election was so avoided, first rendered incapable to supply that vacancy? Whitelocke proves that it was not by common law.* The resolution of the House of Commons had declared treating to be bribery, but it could not make law; and Whitelocke showed that such was not the law. The statute of William III. first made treating an offence; and the *time* within which it occurred, was a material ingredient in that offence. The words "*such election*" are terms of reference,—to that particular election which took place between the issuing of the writ, and the closing of the poll.

It was admitted that bribery rendered parties ineligible to supply the vacancy which their bribery had occasioned; but as the treating imputed to Mr. Thelluson did not take place within the prohibited period, it cannot affect his seat. Mr. Dallas then insisted that the two supplementary resolutions before spoken of, in the *Second Norwich* case, ought to be taken as the decisions of the committee, and to conclude the question. After the evidence, the defence was summed up by Serjeant Heywood, the learned author of the *Treatises on County and Borough Elections*, who adopted and expanded the arguments, and added to the authorities which had been offered by Mr. Dallas: and after Mr. Tierney had finally replied, the committee resolved—

“That Mr. Thelluson was not duly elected; that Mr. Tierney ought to have been returned; that he was duly elected; and that the votes given for Mr. Thelluson had been thrown away.”

The *Second Southwark* case, therefore, is a well-weighed and conclusive decision of a Select Committee, proceeding on a thorough examination of statutory and parliamentary common law, that treating avoids an election, and disables one proved guilty of it to stand at the vacancy which his own treating has occasioned; and that his opponent, though in a minority, may be declared the sitting member, if he prove that he duly notified to the electors the ineligibility of the former sitting member.

This succession of cases throws light on the structure of the statute of William III.: but there is yet another which occurred six years after that of the *Second Southwark* case, viz. in the year 1803, argued with learning and ability at least equal to that

* Ante, p. 455.

exhibited by Mr. Tierney and his opponents. This is the *Herefordshire* case.* The facts lie in a narrow compass.

The sitting members were Sir George Cornwall, and Colonel Cotterell; and there were two classes of petitioners, one against each sitting member. The charge against Sir G. Cornwall was one of treating and bribery; that against Colonel Cotterell was for treating. After a long investigation, the latter was unseated, but the former declared duly elected, owing to a singular turn of the case, noticed in a previous chapter.† On the petitioner's counsel proceeding to open the case against Sir George Cornwall, after that against Colonel Cotterell had been concluded, it appeared, on producing the poll-books, that of the eight petitioners, seven had *voted for Sir George Cornwall*, and the eighth for Colonel Cotterell: but it was proved that he was no freeholder, on which his name was struck out of the petition. The committee then determined that the seven petitioners against Sir G. Cornwall, having all voted for him, after knowing of the treating—four of them having received the tickets, which will presently be mentioned—were inadmissible as petitioners! The case against Colonel Cotterell was—that, on the first three days of the election, voters were entertained in considerable numbers at public houses, being, in some instances, directed to them by the Colonel himself; in others, by persons employed in his interest: but it was not pretended that the entertainment was “at all excessive, or extravagant.” Further than this, it was proved that every voter, who gave his vote for the Colonel, was immediately presented with a ticket entitling him to five shillings. This was generally done in the Colonel's presence, and one ticket he gave with his own hands. The elector who gave him a *single* vote, received two tickets: and these were either carried to public houses at Hereford, where their bearers received refreshment to the amount of their value, or they were sold for 4s. 6d. each, to persons attending for that purpose. These tickets were afterwards carried to the Colonel's banker; and the amount of them—seven hundred and four pounds—and also the publicans' charges, were paid by the banker, and placed to the Colonel's account, with his knowledge and approbation. This course was adopted by *each of the three* candidates, according to a plan arranged between them before the

* 1 Peckwell, 184—216.

† Chap. XVI. p. 312.

election. These facts, it was contended, avoided Colonel Cotterell's election, as a violation of statute 7 Will. 3, c. 4.

The argument for the Colonel was substantially thus: the question being, in a word, whether THE MERE ACT of giving ANY money, meat, or drink to a voter, during an election, for any purpose, or upon any occasion, is made an offence under sect. 1; or whether—as the sitting member insisted, such treating only is contemplated by the act, as is given by a candidate “in order to be elected”—i. e. with a view to obtaining the votes of the electors. These words make the *intention* essential to the crime. If the simple act of giving money, meat, or drink to an elector, between the teste of the writ and the election, were an offence, a candidate could, during that interval, neither entertain his friends, nor assist his neighbours, without danger. Therefore it may be reasonably inferred that such treating, before an election, as cannot influence it, is equally innocent as if given at any other time. The act is not a sumptuary one, nor meant to forbid the decent and moderate exercise of hospitality: but such treating only is an offence, as from its profusion, or from other circumstances, has been shown to have had for its object, tendency, or effect, to influence the election. This appears as well from the law before the passing of the act, as from the construction from time to time placed on it. It is to restrain the evils of “*excessive and exorbitant expenses*,” that the act forbids, within the limited period, any person giving to any elector, or elective body, any entertainment, or promise of it, “*in order to be elected, or for being elected*.” There must be a gift, or a promise; but it must be with the particular specified intent—“*in order to be elected*.” The various authorities were then cited, which have been already laid before the reader, down to the *Second Southwark* case, in order to support this proposition. It was admitted that the *smallness* of the sum, or entertainment, was immaterial, it either was given with a corrupt *intent*, or had the *effect* of influencing the election. Had the sum been large, or entertainment profuse, as in the *Southwark* cases, that would have been conclusive as to the object of them. Here the sum given to each elector was so small as to raise the strongest presumption that it had *not* been intended as a consideration for his vote. This, however, is here not left to presumption or inference; for the contrary can be demonstrated by the fact that the tickets were given BY ALL the candidates,

according to a plan previously concocted with the commendable object of preventing those enormous expenses and scenes of debauchery too frequently attending popular elections. It is impossible to say that what operated equally from *all* sides, could influence a voter to *any* side. An election implies preference of one, and rejection of others: but here it was expressly provided that no cause of preference should arise from the distribution of the tickets: and it was impossible that “freedom” and “indifference” of election could have been invaded by such a course of procedure; and equally impossible to devise a more discreet method of preventing ‘enormous expense.’

The argument against the Colonel was as follows:—

Wilfully to do a prohibited act, is, *of itself*, sufficient evidence of an INTENT to break the law; and the suggested distinction between the act, and the purpose, was never before heard of in a court of justice, and is subversive of first principles. An intent to do the act prohibited by law, is an unlawful intent; and it is no plea for one doing that act, to say that he did not intend to do the mischief against which the law, by that prohibition, had endeavoured to guard. Considering the grounds on which the sitting member had defended himself, a more important point could not have arisen; for in all former cases, the defence has consisted in the denial of the fact, the discrediting of the witnesses, or disputing the relationship of principal and agent: but here it is, for the first time, openly contended that there is a species of treating, at the very place and time of election, which is not within the statute of William! The giving anything to a voter during an election, is indeed forbidden; but money given to a physician, a manufacturer, or an object of charity, or entertainment to a friend, who *happens* to be also an elector, is not criminal, because it is not given to them as voters, but as persons standing in other relative situations to the giver. Here it is not pretended that those who received the money or entertainment received it in any other character than in that of voters. The object of the act was to put an end to shameless profligacy and profusion, and prevent the representation of the kingdom being confined to such only as could bear the expense of a popular election, throughout which the electors were to be maintained at the expense of the candidate. It is the safest course, in order to put an end to this enormous evil, to stop the first approaches to it. The legislature

desired to correct extravagance, as well as corruption : to strike at the root of them. To prevent enormous and corrupt expenses, they have forbidden ALL expense, to avoid pretexts for raising future questions as to what was, or was not, enormous or corrupt. Otherwise, a door would be left open to evasions of all kinds, and it would be impossible to distinguish between lawful and unlawful expenses. For this purpose it is that the law is so severe and explicit; yet the committee is now asked to take the first step towards defeating such wise purposes! The sitting member's construction of the statute is faulty. *Ribbons v. Crickett** decides, that it is contrary to the statute for a candidate to furnish any provisions to any voter, after the teste of the writ: and that the words "in order to be elected," do not apply to the former part of the first clause of the statute of William. Here, however,—if the acts complained of were *not* done "in order to be elected,"—for what *were* they done? The petitioners might safely offer to give up their case, if any man could assign a reason why Colonel Cotterell should expend 704*l.* in tickets of five shillings each, distributed to persons who voted for him, unless it was 'in order to be elected.' Then it is said, that this could not have been done in order to be elected, because all the candidates did the same: but it is an extraordinary thing to excuse a crime, by increasing the number of the offenders. Though all did it, all did it 'in order to be elected'—pursuing by the same course, the same forbidden object. As to the smallness of the sum given,—it is a fallacy to divide the sum expended, among the voters who received it, and then to take the portion given to each man, as the subject of the argu-

* "I am perfectly aware," said Lord Chief Justice Eyre, in delivering the judgment of the court, "that great difficulties may arise from construing this act rigidly, but perhaps still greater will arise if it be not so construed. It is true that a voter who comes from a distance may have reason to complain if he be not provided with necessaries, but it is also obvious, that if the candidate can supply him, he may supply himself. If any exemption is to be allowed for voters not resident, the whole mischief complained of in the act, will necessarily follow. It will be impossible for the candidate to make a distinction between those voters who reside at a distance, and those who live within half-a-mile of the place of voting. The legislature has drawn a strict line which is not to be departed from; it says that after the teste of the writ, no meat or drink shall be given to the voters by the candidate; and that being the case, this court cannot give any assistance to the plaintiff, consistently with the principles which have governed the courts of justice at all times, and with the cases which have been cited this day."—1 Bos. & P. 266.

ment. The question is *not* what has each elector received, but what has the sitting member expended, in order to his election. It was finally argued, that the acts challenged by the petitioner came within the Standing Order of the House (which was alleged to be in force),* the statute of 7 Will. 3, c. 4; and stat. 2 Geo. 2, c. 24, s. 7:—and that for all the reasons assigned, the election was void. And of this opinion, as we have seen, was the committee.

This case is argued with great ability, and fittingly reported. There are no topics of importance omitted by the counsel on either side, each of whom agreed to consider the case, as in fact it was, as a contest of *principle*. It seems impossible to resist the reasoning of the petitioners from the professed objects of the act, and its deeply-considered language.

In the ensuing year [1804], in the *Middlesex* case,† Mr. Mainwaring was charged with treating—by means of victuals supplied at an inn, at Brentford, by the order of persons proved to be his agents, and for which other persons, also proved to be his agents, had promised to pay. Though “the entertainment afforded to the voters was not proved to be by any means extravagant, nor was it at all charged, or insinuated, that it was given them for the purpose of influencing their votes, or for any other purpose than merely for their necessary refreshment,” the charge was so clearly made out, that “the counsel for Mr. Mainwaring declined to address the committee in his defence.”

We have thus before us, a short series of parliamentary leading cases, as they may be termed, on the statute of 7 Will. 3, c. 4, occurring at intervals from the year 1696 down to the year 1804. There are some others which might have been cited, but which on examination it appears not necessary to bring forward, as they do not appear to involve any important principle beyond those which are to be collected from the cases in question. The earlier are perhaps more important than the succeeding ones, as affording what may be designated a contemporaneous exposition of this most important

* Sed vide ante, p. 426.

† 2 Peck. 31. In this case “the committee sat one hundred and twenty days!”—p. 32. The decision of the committee was, that Sir Francis Burdett was not duly elected, and that Mr. Mainwaring was; that by his agents, he had committed acts of treating, whereby he was incapacitated to *serve* in parliament upon such election; and that the election was void, so far as it respected the return of Sir Francis Burdett.

statute, which has continued the unaltered law of the land for nearly a hundred and fifty years, during which it has been called incessantly into action on occasions of great interest, and vitally affecting members of the House of Commons themselves. If ever, therefore, a statute framed with a noble object in view, and so long acted upon and sanctioned by those whom it affects, was entitled to respect, and justified the utmost exertion to discover its true interpretation, it is surely such an one as that under consideration. “The best and truest way of expounding an instrument,” observes Lord Coke, “is by referring to the time when, and the circumstances under which, it was made. *Contemporanea expositio est optima et potissima in lege*.* . . . Great regard,’ he says elsewhere, ‘ought, in construing a statute, to be paid to the construction which the sages of the law, who lived about the time, or soon after it was made, put upon it, because they were best able to judge of the intention of the makers, at the time when the law was made.’”† In delivering the opinions of the judges, in the *Sussex Peerage* case, in the House of Lords,‡ Chief Justice Tindal thus expressed his learned and enlightened view of that matter. “The only rule for the construction of acts of parliament is, that they should be construed *according to the intent of the parliament which passed the act*. If the words of the act are in themselves precise and unambiguous, then no more can be necessary than to expound the words in their natural and ordinary sense. The words themselves, do, in such a case, best declare the intention of the lawgiver. But if any doubt arise from the terms employed by the legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble : which, according to Chief Justice Dyer, is, ‘a thing to open the minds of the makers of the act, and the mischief which they intended to redress.’” In the case of *Lyde v. Barnard*,§ Baron Parke has thus expressed his weighty opinion, on the construction of acts of parliament : —

“I admit that words may be construed in a sense different from their ordinary one, when the context requires it, or when the act is intended to remedy some existing mischief, and such

* 2 Inst. 11.

† Dwarris on Statutes, 562 (2nd ed.)

‡ 11 Cl. & Fin. 143.

§ 1 Mee. & W. 113.

a construction is required, to render the remedy effectual. For we must always construe an act so as to suppress the mischief, and advance the remedy.”

In a previous part of this chapter has been given, *in extenso*, the first section of stat. 7 Will. 3, c. 4;* and in a preceding chapter† have been set together those provisions of the clause which seem specially applicable to bribery.

It may be useful now to adopt the same course with respect to those portions which appear contra-distinguished to those of bribery, and to constitute *treating only*.

STATUTE OF WILLIAM III. AS TO TREATING.

SECT. 1. — ‘Whereas grievous complaints are made, and manifestly appear to be true, in the kingdom, of undue elections of members to parliament, by excessive and exorbitant expenses, contrary to the laws, and in violation of the freedom due to the election of representatives for the Commons of England in parliament, to the great scandal of the kingdom, dishonourable, and may be destructive to the constitution of parliaments: whereupon, for remedy therein, and that all elections of members to parliament may be hereafter freely and indifferently made, without charge or expense, be it ENACTED AND DECLARED,

‘That no person or persons hereafter to be elected AFTER THE TESTE of the writ OF SUMMONS to parliament, or after the teste, or the ISSUING out, or ORDERING of the writ or writs of ELECTION upon the calling or summoning of any parliament hereafter, or after any such place BECOMES VACANT‡ hereafter, shall or do hereafter, BY HIMSELF, or themselves,

or by any other ways or means§ ON his or their behalf,
or at his or their CHARGE,

BEFORE his or their ELECTION

directly or indirectly, give, present, or allow, to any person
or persons having voice or vote in such election,

* Ante, pp. 506, 507.

† Ante, pp. 426, 427, Chapter XXI.

‡ See a judicial construction of these words, ante, p. 263, note. i. e. if a candidate returned at a general election, dies before parliament meets, the place “becomes vacant” *immediately* on his death.

§ These words “ways or means” were inserted by the legislature, as they now stand, between the words “or by any other [.] in his behalf, or at his charge,” used in the Resolution of the 2nd April, 1677.

ANY MEAT, DRINK, ENTERTAINMENT, OR PROVISION,

or make ANY entertainment,

or shall make ANY promise, agreement, obligation, or engagement to give or allow any meat, drink, provision or entertainment

to or for any such person or persons in particular,

or to any such county, city, town, borough, port or place, in general, or to or for the use, advantage, benefit, employment, profit, or preferment of any such person or persons, place or places, IN ORDER TO BE ELECTED, OR FOR BEING ELECTED to serve in parliament for such county, city, borough, town, port, or place.

‘ SECT. 2.—And be it DECLARED and ENACTED, that every person,

So giving, presenting, allowing, making, promising, engaging, doing, acting, or proceeding, shall be and is hereby DECLARED and enacted

disabled and incapacitated,

UPON SUCH ELECTION, to serve in parliament, for such county and borough, or place ;

and shall be deemed or taken, and is hereby DECLARED and enacted to be deemed and taken, no member in parliament ;

and shall not act, sit, or have any vote or place in parliament ;

but shall be and is hereby DECLARED and enacted to be, to all intents, constructions, and purposes,

as if they had NEVER been returned or elected members for the parliament.’*

In other words,—

Whoever shall, AFTER the teste of the writ, or after any place becomes vacant, and BEFORE his election, either by himself or by any other ways or means on his behalf, or at his charge, give or allow any meat, drink, entertainment, or provision, or make any promise of such, to any voter in particular, or any place in general, *in order to be, or for being elected*, shall be disabled upon such election to serve for that place in parliament; shall be

* Post, p. 171, A., 172, A.

deemed no member of parliament; shall not act, sit, or have vote or place in parliament; and be deemed never to have been returned or elected.

The questions here are, (1) what is here prohibited; (2) within what periods; (3) by, and to whom; and (4) what is the consequence of violating that prohibition? The statute itself supplies the answers: (1) giving or promising any meat, drink, entertainment, or provision, in order to be elected; (2) between the teste or issuing of the writ, and the being elected—i. e. *the close of the poll*;* (3) by the candidate, or any ways or means on his behalf, or at his charge, to any voter, or place; and (4) if this be done, he who does it, or on whose behalf, or at whose charge it is done, is incapacitated, on that election, to serve for that place in parliament.

The words which have presented difficulty, and occasioned discussion, are—“*any meat, drink,*” &c. “*by himself, or by any other ways or means on his behalf, or at his charge;*” . . . “*in order to be elected, or for being elected;*” and “*upon such election.*”

On this it is to be observed,

I. The words ‘no person shall give ANY meat, drink, entertainment, or provision,’ convey as absolute a prohibition of ANY amount—from the least to the greatest—of meat, drink, entertainment, or provision, as can be put into words: “NO ‘such’ person shall give ANY.” In the language of Chief Justice Eyre,† in construing these words, “the legislature has drawn a very strict line:—it says, that, after the teste of the writ, NO meat or drink shall be given to the voters, by the candidate.”

II. The words “IN ORDER TO be elected, or FOR BEING elected”—were fully discussed in the *Herefordshire* case.‡ If they were blotted out of the statute, then a candidate giving a piece of bread, or a glass of wine, or beer, to an elector, under any circumstances, would lose his seat: but the act being prohibited only when done *with a particular object*, viz. “to be elected, or for being elected,” it becomes a question of fact and intention, for the committee to decide. Can they say that there

* Aylesbury [A.D. 1848], Print. Min. 156.

† Ante, p. 521, n.

‡ Ante, p. 518.

was any design to influence the vote? If a candidate, seeing a man about to swoon through fatigue, in the street, and neither knowing nor caring whether he were a voter, though, in fact, he was one, gave him on the spot a glass of wine—could he be said to have given the voter ‘drink,’ ‘in order to be elected?’ Sir Robert Peel said, in the year 1848,* that under this statute, “the mere giving refreshment was an offence, *without regard to the motives of the giver*, and rendered him liable to the loss of his seat:” but may it not be contended that the words “in order to be,” or “for being” elected, necessarily imply an illicit object present to the giver’s mind at the time, entailing incapacity without regard to the actual effect or tendency of the act on the mind of the voter? It seems, nevertheless, that Sir Robert Peel acted only in conformity with the principle laid down by the *Herefordshire* and *Middlesex* Committees; and that was, that the doing of the prohibited act of itself supplied *evidence* of the object or motive with which it had been done—that is, in point of law, of a corrupt intent. The object of this very rigorous act, undoubtedly, seems to have been, to put an end to all treating whatever, under even the most innocent guise: to draw a line distinctly, saying, who steps over it, offends the act, and incurs its disability.

It has been well observed by Mr. Luders,† that the greatest difference between the resolution of 1677 and the act of Will. III., founded on it, consists in the EVIDENCE required of the facts. The resolution declared the facts alone, *if duly proved*, to be bribery and criminal, but the statute infers the guilt, from the object and intention: the several acts must be done, ‘*in order to be elected.*’ In a MS. note of Mr. Luders, in his copy, now in the Inner Temple Library, he says, “the act is to be considered as *enforcing a rule of evidence*: making the FACT of treating, after the writ, CONCLUSIVE against the party, of his having thereby secured his election; and not merely a presumption that may be rebutted by evidence.” This last seems, upon the whole, to be the true and safe interpretation of the statute 7 Will. III. If the act be *done* by the candidate, or by any ways or means on his behalf, the law will deem that fact proof of its having been done “in order to,” or “for his being, *elected.*”

* 4th August, 1848. Hansard, c. col. 1154.

† Vol. 1, p. 69, note D, to *Ipswich* case; ante, p. 263, 264.

This makes it the more important to ascertain what is doing it “by any ways or means on his behalf.”

III. “By himself, or by ANY OTHER ways or means ON HIS BEHALF, or at his CHARGE,”—and that “*directly* or *indirectly*.”

There can be no doubt that these expressions were used by the legislature, after great and anxious consideration of their import and tendency, in order to defeat every imaginable device for frustrating their object; which was, while being solicitous for the freedom and purity of election, also to be just towards one who ought not to be held responsible for acts which he neither did himself, nor expressly nor impliedly sanctioned or ratified: for if his liability were to be extended so far, no man dare ever become a candidate to represent a constituency in parliament. The enactment, however, is based on a full recognition of the maxim, that *qui facit per alium, facit per se*. What, then, is the true interpretation of the words used so considerately by the legislature?

It is fortunate that they have received a distinct and deliberate judicial construction, after time taken to consider their judgment, by the Court of Exchequer, in the year 1831, when Lord Lyndhurst was Chief Baron, and Sir John Bayley one of the Barons. And beyond even this, the judgment of the court was in affirmance of the ruling at nisi prius of one of the soundest and ablest judges that ever sate in Westminster Hall.*

During† four days of the election for Shrewsbury, in 1830, the defendants being certain ‘supporters’ of one of the candidates, had previously given verbal and written orders, by tickets, to the plaintiff, a publican in the town, to supply provisions to a hundred voters of that candidate, as well as to others who were not voters; and the defendants in question had themselves taken refreshment at the public house. After the election, the plaintiff’s bill had been signed by the defendants, as a voucher of its being a just claim;—and it was proved that the plaintiff’s house had, in the first instance, been opened by the candidate’s head *committee*, after the polling had begun; but

* Vide ante, p. 427.

† *Hughes v. Marshall*, 2 Crompton & Jervis, 118; S. C. 2 Tyrw. 134.

none of the four defendants was a member of that committee. The bill was as follows:—

“Friday, July 30, 1830. Elephant and Castle Inn, Shrewsbury.

“Eating, ale, &c., given to different burgesses, carriers, &c., *by orders of the undersigned*. Amount of the bill, £23.”

(Signed) A., B., C., D. [the four defendants].

This was the state of the facts. Were such an action to be *now* brought, it must be remembered that the defendants themselves could be examined, on either their own, or the plaintiff's behalf.

The defence was founded on the act under consideration—stat. 7 Will. 3, c. 4, s. 1—that the supply of the provisions having been in contravention of that act, could give no right of action. At the trial, Mr. Justice Patteson expressed his opinion to be, that the case could not be within the statute, unless the jury should be satisfied that the defendants had been proved to have been AGENTS TO, OR IDENTIFIED WITH, the candidate:—and the question which he accordingly put to the jury, was this: “were the articles in question supplied at the *request und on the personal credit* of the defendants?” The jury found that they had been, and gave their verdict accordingly. A rule was obtained for a new trial, on the ground, first, that the ruling of the judge was wrong—that the contract was void at common law; that treating being a species of bribery, and bribery a crime, that every contract founded on bribery, was void; secondly, that the case was also within stat. 7 Will. 3, c. 4, s. 1—as the words “by any other ways or means on his behalf,” must be construed to relate to all undue means mentioned in the clause, notwithstanding they be resorted to by *strangers, without the authority of the candidate*.

Lord Lyndhurst here at once interposed with the observation—“‘*On his behalf*,’ must be understood to comprehend only acts resorted to AT THE DESIRE, *or with the KNOWLEDGE* of the candidate.”

Counsel then proceeded to argue that there *had* been evidence of that fact.

The court, from the importance of the question, took time to consider. Some time afterwards, Lord Lyndhurst delivered the brief but unanimous and decisive judgment of the court, dis-

charging the rule. His lordship said that they concurred in the ruling of the learned judge at the trial.

“It is perfectly clear,” from the language of stat. 7 Will. 3, c. 4, s. 1, “that no transaction falls within the provision, unless *the candidate, or person to be elected, has some share in the transaction*. To bring a case within the statute, the acts mentioned in it must be done *by the candidate*: that is, not by him *only*, in his own person, but **BY HIM, OR BY SOME PERSON ACTING FOR HIM, AND ON HIS BEHALF**. It appears to us that there is nothing in the evidence, in the present case, to affect the candidate. And indeed the question was put to the jury, whether the refreshments were supplied on the credit of the candidate, or on the individual credit of the defendants; and the jury found that the refreshments had been supplied on the individual credit of the defendants. We think, therefore, that this case is not within the provisions of the Treating Act.”*

The effect of this important judgment, which has never been called in question, is, simply, that to bring a case of meat, drink, provision, or entertainment supplied to a voter, within the stat. 7 Will. 3, c. 4, s. 1, the act must be “**DONE BY THE CANDIDATE:**” that is, personally or representatively: “by him, or by **SOME PERSON** acting for him, and on his behalf.” This is the opinion of three great lawyers—Lord Lyndhurst, Mr. Baron Bayley, and Mr. Justice Patteson, and there is no conflicting decision. Five years afterwards, the same court, also after taking time to consider, delivered, through that eminent lawyer, Mr. Baron Parke, the following decision, in the case of *Thomas v. Edwards*.† The marginal note is as follows, and correctly represents the effect of the decision.

“In an action by an innkeeper against one of the committee of a candidate at a contested election, for refreshments to voters, supplied under orders of a person named Miller, it was held, that the plaintiff, to recover, must prove that Miller had been employed by the defendant, either alone, or jointly with others, to give the order, and that in doing so, the defendant himself was not acting as the agent for any other person;—or else, that

* The reader has now had accounts of this case given by two different reporters. That above is by the present Chief Justice of the Common Pleas, and Mr. Justice Crompton; that at p. 264—6, ante, by Mr. Tyrwhitt.

† 2 Mee. & Wels., 215.

Miller was a *principal*, jointly with the defendant, or with the defendant and others; and that it would make no difference that the plaintiff, at the time, considered *Miller* as *authorised to contract on behalf of the candidate, if in fact he were not so authorised.*"

While the courts of law have thus authoritatively interpreted those words of the statute of Will. III. requiring the candidate to be connected with treating, by either his own personal acts, or those of persons whom the law considers him to have constituted his agents, and consequently, their acts his own; such also has been the uniform course of Select Committees of the House of Commons. Before they will allow evidence of treating, they require proof of agency, as was repeatedly ruled by the committees of 1848, and will appear in the chapter on Agency; the legislature not having hitherto thought proper to invert the order of proofs, as it has lately done in the case of bribery.* This rule, however, is subject to the solitary and reasonable exception, that when the acts of treating and of agency are inseparably intermingled,† committees will, *ex necessitate rei*, dispense with the preliminary proof of agency. Such proof, *per se*, indeed, would be, from the nature of the case, impossible.

In other words, before a committee will admit any evidence of treating, they always require that the orders for it shall be traced to the candidate or his agents: proof, in short, that the treating went on, not only with the knowledge, but by the desire and at the charge of the candidate.‡

The case of *Hughes v. Marshall* seems to supply this practical test to the matter under consideration. Assuming no illegality to intervene, could an action be maintained against the candidate, for entertainment supplied, at his election, through orders issued by others? If it could, it would be because they had been his agents, whom he had (whether expressly or impliedly is a matter of evidence only) *authorised* to give the orders. If he had not so authorised them, they were not his agents; and if they were not his agents, their orders were the orders of utter strangers to him, and cannot affect him.

* Ante, p. 478.

† Vide *Aylesbury* case, P. R. & D. 271.

‡ *Newcastle-under-Lyme*, Barr. & Aust. 445, [A. D. 1842]; *Lyme Regis*, ib. 529, [A. D. 1842].

It thus at once appears, that the great question in almost all cases of treating, under the stat. of Will. III., is one respecting AGENCY; and that, again, is practically, in almost every instance, a question of EVIDENCE.

There can be rarely any difficulty as to the fact of treating, by a supply of meat, drink, entertainment, or provision;—nor as to the person who actually supplied them, or to whom they were supplied: nor as to the time when they were supplied, which must be between the teste or issuing of the writ, or the vacancy of the seat and the close of the election. The great struggle always is, and must needs be, to bring the treating home to the sitting member, when the question is as to his right to retain his seat, or to the petitioner, where he seeks to acquire it. The further consideration of these matters, is reserved for the chapters on Agency, and Evidence.

IV. “Disabled and incapacitated, UPON SUCH ELECTION, to serve in parliament, for such county, borough, or place, &c.

The words are not, as in the Irish act,* “incapacitated to serve in parliament, upon such election;” nor “incapacitated to serve, upon such election, in parliament;” but “incapacitated, upon such election, to serve in parliament.” The word “upon” seems equivalent to—“by reason, or in virtue, or in respect, of” such election. And it may be, that in the *Thetford* case,† they read the act thus: “shall be disabled and incapacitated, by having procured his return by such means, to serve for that place, in the then existing parliament,” i. e. for the remainder of the period of three years; a version of the act not, as we have seen, in conformity with the established parliamentary interpretation of it. Were the matter *res integra*, it might possibly be contended, that in the two phrases, “before his election,” and “upon such election,” in ss. 1, 2, the word “election” is identical in meaning, and linked together as such, in the act. In the former section, “before his election,” seems to mean the candidate’s being elected on that particular occasion; and in the latter, “upon such election,” that if on that particular occasion, and to secure that

* Stat. 35 Geo. 3, c. 29, s. 19, post, p. 57, A.; *Nottingham*, Barr. & Arnold, 136 [A. D. 1843]; *Cambridge*, id. 185 [A. D. 1843]; *Wigan*, id. 788 [A. D. 1846]; Rogers on Elections, 275-6.

† Ante, p. 508, 509.

particular result, viz. his *election*, he treated, he should be incapacitated “on SUCH election,” to serve in parliament for the place in question. Arguments such as these, however, have been urged on committees, as we have seen, in vain ; they have put a more extended construction on the words “such election,” and it is not likely that that construction will yield, even were it to be deemed desirable, to anything but a legislative enactment. Were such indeed to be made, there can be little doubt that it would give full effect to the decisions of committees, as to a highly remedial act, requiring a liberal construction to effectuate the purpose of its framers. It might even be, that the legislature would extend the disability throughout the entire parliament, as it has done, in the recent statute, presently to be considered. In the mean time, it is to be taken as settled law, that a candidate unseated on the ground of treating, cannot stand at the election by which the vacancy so created is to be supplied.

The allegation in the PETITION, of TREATING, under the stat. of 7 Will. 3, c. 4, may be as follows :—

“ That AFTER THE TESTE OF THE WRIT for holding the said election,
 “ and before, at and during the said election, the said Q. did, by him-
 “ self and his agents, friends and partisans, or by divers ways and means
 “ in his behalf, or at his charge, directly and indirectly, give, present
 “ and allow to persons having votes in and at the said election, money,
 “ meat, drink, entertainment and provision, and did make presents,
 “ gifts, rewards and entertainments, and did make promises, agreements,
 “ obligations and engagements to give and allow money, meat, drink,
 “ provision, presents, rewards and entertainments, to and for persons
 “ having votes in and at the said election, and to and for the use, benefit
 “ and advantage, employment, profit and preferment of such persons,
 “ to induce such persons to vote at the said election for the said Q., or
 “ to forbear to vote at the said election for the said Z., or in order that
 “ he, the said Q., might be elected, or for being elected to serve in this
 “ present parliament for the said borough ; that by reason of the said
 “ last-mentioned corrupt and illegal practices, the said Q. was, and is
 “ wholly incapacitated and ineligible to serve in this present parliament
 “ for the said borough, and the said election and return of the said Q.
 “ were and are wholly null and void.”

Thus much for statute 7 Will. 3, c. 4, as far as concerns England. It has been held to extend to SCOTLAND. This was

the decision of the *Forfar** committee in the year 1830 ; when the statute of William was, for the first time, extended to Scotch elections. It was argued, that though the act had been passed before the union of the two countries, it was made a part of the law of *both* England and Scotland by stat. 6 Anne, c. 7, s. 30, passed after the union, which “enacts and *declares* that every person disabled to be elected, or to sit, or to vote in the House of Commons of any parliament of England, shall be disabled to be elected or to sit or vote in the House of Commons of any parliament of Great Britain.” The statute of 7 Will. 3, c. 4, is highly remedial, vitally affecting the constitution of the United Kingdom ; and in unison with its spirit and object, it is the person who has **TREATED** in order to procure his seat—not he only who has done it in England—who is incapacitated. The spirit of the statute, and the wide extent of the mischief which it was intended to suppress, alike require that it should receive a liberal construction. These reasonings satisfied the committee ; who, after full argument, resolved, “That it is the opinion of the committee, that the statute of 6 Anne, c. 7, s. 30, extends the statute 7 Will. 3, c. 4, to Scotland.” There can be no doubt of the propriety of their decision ; and it has been ever since acquiesced in.

The substantial provisions of the statute are also extended to IRELAND, with minor modifications, by statute 35 Geo. 3, c. 29, s. 19,† [A. D. 1795], as far as relates to counties and boroughs, and by stat. 4 Geo. 4, c. 55, s. 79 [A. D. 1823], as to cities and towns being counties. (1.) Instead, however, of the expression in the English act, “after any such place becomes vacant hereafter,” the Irish act has—“after the vacancy shall have happened, to supply which the election shall be held.” (2.) Into the same section of the Irish act is introduced the prohibition against giving or presenting “*cockades, ribands, or any other mark of distinction*”—which was shortly afterwards [A. D. 1827], enacted as to England, by stat. 7 & 8 Geo. 4, c. 37.‡ (3.) The order of the words in stat. 7 Will. 3, c. 4, s. 2, viz.—“disabled and incapacitated, upon such election, to serve in parliament for such place”—in the Irish act, is changed, as intimated in a previous page, to “disabled and incapacitated

* Talbot's *Forfar* case, p. 69.

† Post, p. 57, A.

‡ Post, p. 218, A.

to serve in parliament upon such election.” (Lastly). The Irish act stops with these words: dropping the remaining clause in the English act,—as was suggested, *arguendo*, in the *Dungarvon* case,*—“as mere surplusage.”

We now proceed to explain the sweeping and stringent provisions against treating, contained in a single clause of stat. 5 & 6 Vict. c. 102.

After a hundred and forty seven years’ experience of the operation of stat. 7 Will. 3, c. 4,—viz. from A. D. 1695 to A. D. 1842,—in the latter year it was deemed expedient to “EXTEND” its *provisions*: which was effected by the last section (s. 22) of

STATUTE 5 & 6 VICT. c. 102, as follows.

Sect. 22. “And whereas the provisions of an act passed in the “seventh year of the reign of King William the Third, intituled ‘An Act for preventing Charges and Expenses in Elections of Members to serve in Parliament,’ have been found “insufficient to prevent corrupt treating at elections, and it is “expedient to extend such provisions; be it enacted,†

“That every CANDIDATE, or PERSON ELECTED to serve in parliament for any county, riding, or division of a county, or for any city, borough, or district of boroughs, who shall,

by himself, or by or with ANY PERSON,
or in ANY MANNER, directly or indirectly,
give, or provide, or cause, or KNOWINGLY ALLOW to be
given or provided,

WHOLLY, OR PARTLY, AT HIS EXPENSE,
or PAY, WHOLLY OR IN PART, any expenses incurred,
for ANY meat, drink, entertainment, or provision,
to or for ANY person,
at ANY TIME,
either BEFORE, DURING, or AFTER such election,
FOR THE PURPOSE OF CORRUPTLY INFLUENCING such
person,

or ANY other person,
to GIVE, or REFRAIN FROM GIVING, his vote in any such
election, or for the purpose of corruptly REWARDING
such person, or any other person,
for having given, or refrained from giving, his vote at any
such election,

* K. & O. 28.

† Not “declared and enacted.”

shall be INCAPABLE of being ELECTED, or SITTING in parliament, for that county, &c.

DURING THE PARLIAMENT for which such election shall be holden.”*

The statute extends to the whole United Kingdom ; neither Scotland nor Ireland being expressly, or by necessary implication,† excepted.

The following may be the form of allegation in a PETITION founded on this statute.

“ That BEFORE, DURING, and AFTER the said election, the said Q. did, by himself, and his agents, friends and partisans, or by or with divers persons, or in divers ways and manners, directly or indirectly give or provide, or did cause, or did knowingly allow to be given or provided, wholly or partly at his expense, or did pay, wholly or in part, divers expenses incurred for meat, drink, entertainment and provision, to and for divers persons, for the purpose of corruptly influencing divers of such persons, or divers other persons, to give their votes in the said election for the said Q., or to refrain from giving their votes in the said election for the said S., or for the purpose of corruptly rewarding divers of such persons, or divers other persons, for having given their votes in the said election for the said Q., or for having refrained from giving their votes at the said election for the said S.; that, by reason of the last-mentioned and illegal practices, the said Q. was and is incapable of being elected or sitting in parliament during the present parliament for the said borough, and the said election and return of the said Q. were and are wholly null and void.”

The scope of this comprehensive enactment is substantially as follows.

If any candidate, at any time, whether *before*, during, or *after* the election, either himself or by his agents, give or provide any meat, drink, entertainment, or provision, to any elector, for the purpose of corruptly influencing or rewarding him ;—or knowingly allow it to be done wholly or partly at his expense ; or pay wholly, or in part, any expenses so incurred, though at the time of their being incurred he knew nothing of it ; he will lose his seat for the place where such treating occurred, for the whole parliament.

In other words, *if with a corrupt purpose, at any time, be-*

* Post, p. 274, A.

† Post, p. 42, A.—“ General Observations concerning Statutes passed since the Union with Scotland and Ireland.”

fore, during, or after an election, the candidate personally or by his agents treat a voter, or knowingly allow it to be done, wholly or partly at his expense; or afterwards pay any part of the expenses so incurred—he is disabled from being elected or sitting for the place, during the entire parliament.

Through all this may be seen in action the principle of AGENCY, adoption, and ratification, enlightened by the glare of a corrupt purpose: and the enactment imposes by no means unfair responsibility upon the principal, nor, indeed, augments that which he already sustained.* His judges must be satisfied that he or his agents corruptly treated, or sanctioned corrupt treating, either prospectively, or retrospectively, as evidenced by his having paid for it. If a gentleman spend a thousand pounds in entertaining persons whose votes he is soliciting, what, to the eye of common sense, can be his purpose, but corruptly to influence or reward? The words “for the purpose of corruptly influencing or rewarding,” in the recent statute, are akin to the words “*in order* to be elected, or for being elected,” in the elder one; and the two acts, being *in pari materia*, must receive the same construction. As one part of a statute† is properly called in to help the construction of another part of it, and is fitly so expounded, as to support and give effect, if possible, to the whole;—so is the comparison of one statute with another statute made by the same legislature, or upon the same subject, or relating expressly to the same point, enjoined for the same reason, and attended with a like advantage. It is to be inferred, that a code of statutes relating to one subject, was governed by one spirit and policy, and was intended to be consistent and harmonious. It is, therefore, an established rule of law that *all acts in pari materia, are to be taken together, as if they were one law*—framed upon one system, and having one object in view.

If, according to these principles, the statute of the 7 Will. 3, c. 4, and of 5 & 6 Vict. c. 102, as far as each relates to treating, be incorporated together, as they ought to be by those expounding and enforcing both, they will be found perfectly consis-

* Sir Robert Peel, in the year 1848, truly remarked, that “the law was not thereby made more strict than it had been made by the old statute, which had existed for [nearly] 150 years.”—Hansard, c. 1154.

† Dwaris, 526.

tent ; aiming at the same object, the preventing corruption, and guided by the same principle, the securing a just responsibility for the protection of the public interests. Under whichever of the two statutes a case of treating be presented to a committee, they must see that the facts bring it within the letter and spirit of the law ; whether there have been a supply of meat, drink, entertainment, or provision ; whether it was by the candidate,—either personally, or through his agents ; and whether in order to be, or for being, elected : in other words, corruptly to influence, or corruptly to reward. That corrupt purpose it will not be very difficult to detect, when the recipient of refreshment is a voter, the time that of an election, and the cost that of the candidate.

One of the committees (*Carlisle*), which sate in the year 1848, seem to have been not a little embarrassed by the facts of the case of treating with which they had to deal ; and their decision, as far as the grounds of it are specified in their resolution, has excited considerable observation. The petition complained of bribery (but the charge was abandoned), treating, within statutes 7 Will. 3, c. 4, and 5 & 6 Vict. c. 102, s. 22 ; and “*extensive, systematic, open and notorious bribery and corruption.*”

After a considerable body of evidence had been adduced, showing an extensive system of treating by means of tickets on public houses, during the election, the following colloquy occurred, before the closing of the petitioner’s case, between the chairman and the counsel of the sitting member, as appears by the printed Minutes.*

‘The chairman intimated that it was the opinion of the committee that there had been such an organized system of treating employed at the last election for *Carlisle* ; that it would be in the opinion of the committee unnecessary to carry the evidence further ; that the nature of the evidence was of such a character, that the committee did not see how the evidence could be refuted.

‘The counsel of the sitting member said that he understood the decision of the committee to be to the effect that treating had existed, not that it was traced to the sitting member.

‘The chairman intimated that in the opinion of the committee there was a great deal of evidence affecting Mr. Hodg-

son, he having been proved to be very busy canvassing with all those parties who were concerned in the election.'

'The counsel of the sitting member stated that in the opinion of the counsel of the sitting member, they should be able to rebut or explain a great deal of the evidence which had been given.'

'The chairman intimated, that if the counsel for the sitting member could distinctly say, that they had the means of rebutting the evidence *as connecting the sitting member with the extensive treating* which had been carried on, it would be the duty of the committee to hear any additional evidence that should be adduced on the other side, and leave the counsel for the petitioners to conduct their case in such a manner as they thought best. But the committee were at present of opinion, that there was conclusive evidence of the most extensive system of treating having been carried on at and previous to the election, on the part of those who were conducting the election of Mr. Hodgson.'

Almost immediately after this intimation of the opinion, at which the committee had arrived, the petitioners' counsel stated that on that ground he should close his case, though he had still "a great many other witnesses to call."*

For the sitting member several witnesses were called; and one of them was a Mr. Head, a hanker at Carlisle. He stated† that it was he who had induced the sitting member to become a candidate, promising to give him all his interest; to canvass for him; that the election should cost him nothing—"it was distinctly understood between the witness and the sitting member, previous to entering on the canvass, that he should not be at any expense;" and Mr. Head advanced about 1300*l.* for the purpose of the election, through one of the clerks in his bank, but "not a farthing" ever passed to the hands of the sitting member. When asked if he looked to the sitting member for a return of the money, he declared that he did not hold him legally or morally liable for one farthing—that he could not do so without breaking the pledge he had given; and that if the sitting member proposed to pay him any portion of it, the witness, as a man of honour, could not receive it.‡ "The money was to be advanced for the purposes of the election; but not on the account of the sitting member;" and on that assurance, he proceeded on his canvass; the witness accompanying him, and soliciting publicans in his presence.§ The witness finally added

* Printed Minutes, p. 63.

† Ditto, p. 90.

‡ Ditto, p. 89.

§ Ditto, p. 93.

—“ My belief is, that the sitting member is not two sovereigns out of pocket by the last election : I am sure he has not spent two sovereigns over it.”* After the counsel for the sitting member had summed up his case, “ the chairman intimated† that the “ opinion of the committee was, that the election was void ; but that, under the circumstances, Mr. Hodgson, the sitting member, *was not disqualified by reason of the practices that took place at the last election.*” After the counsel had summed up the case on behalf of the petitioners, the committee came to the following resolutions :—

“ That William Nicholson Hodgson, Esq., is not duly elected a citizen to serve in the present parliament for the city of Carlisle.

“ That the last election for the said city, so far as regards the return of the said William Nicholson Hodgson, Esq., is a void election.

“ That William Nicholson Hodgson, Esq., was *by his agents* guilty of treating at the last election of the said city.

“ That it was not proved that *these acts of treating* were committed *at the expense* of the said William Nicholson Hodgson.

“ That Mr. Head, a banker at Carlisle, had advanced funds to the extent of more than 1200*l.*, the greater part of which was expended by means of tickets for refreshment, issued to the voters from Mr. Hodgson’s committee room, during three weeks previous to the election, and up to the close of the poll, receivable at numerous public houses.”‡

The difficulty which arises on the face of these resolutions is, —without saying what inference might have been drawn from the evidence, as to the “ agency ” of Mr. Head, in point of *fact*, —whether they have not negatived it, in point of *law* ; unless it is to be taken that they included him among the “ agents ” *by whom, but not at his expense*, the sitting member had been declared guilty of treating : but if that were so, then he *would* have been “ *disqualified* ” for being elected or sitting for Carlisle. Whether he was or was not so disqualified, was a question of law, the answer to which would flow from their finding of the facts. Their opinion on that subject was entirely extra-judicial, and amounted to nothing. This public announcement of it, however,

* Printed Minutes, p. 98.

† Ditto, p. 105.

‡ Ditto, pp. 105, 106.

at the close of the case on both sides, may be supposed to afford an involuntary clue to the course of their thoughts on the evidence which had been adduced before them, and the application of that evidence to the statutory law of treating. If they thought him not disqualified, they in effect acquitted him of treating, under the statute of either Will. 3, or Victoria; for if he had done the acts prohibited by the former, he could not stand at the election ensuing the vacancy which they had occasioned; and if those prohibited by the latter, he could not be a candidate for the borough during the whole parliament. How, then, on the facts, can their finding be supported with reference to either statute? They have expressly and in terms withdrawn the case from the statute of Victoria; and also virtually from that of Will. 3, as construed by the cases of *Hughes v. Marshall*, and *Thomas v. Edwards*. If the committee meant that the treating was committed by H.'s agents, *with his authority*, then it was *at his expense*: an action would have laid against him (but for the illegality) for the articles supplied: and so the case would have fallen within the statute of Victoria. Nor could the committee have considered the case within the statute of William: for the words in it, "on his behalf, or at his charge," are substantially the same as "wholly or in part at his expense," or "paying wholly or in part such expense." We have seen, that to bring a case within this latter statute, the meat and drink must be shown to have been ordered by an agent of the candidate, by his authority, and consequently on his credit, and at his expense. "In cases under both statute 7 Will. 3, c. 4, and 5 & 6 Vict. c. 102," says Mr. Rogers, "it is still necessary to trace the orders for what has been done, to the candidate or his agents; and it will be seen* that committees appear to require proof, not only that the treating is going on with the knowledge of the candidate, but at his desire, *and charge*."† If the *Carlisle* Committee intended to say that a case of treating under stat. 7 Will. 3, c. 4, had been made out, on the part of the sitting member's agents, though without his authority, for which interpretation there seems no pretence,—then, to hold that he was nevertheless not disqualified, is to subvert the *Thetford*, *Second Southwark*, and other cases already cited.‡

* The case which he cites will be found ante, p. 531.

† Law of Elections, pp. 265, 266.

‡ Mr. Hodgson stood at the election to supply the vacancy created

It may be regarded as a thoroughly settled proposition in parliamentary election law, that the treating of which Select Committees can now claim cognizance, is the creature of *statute* law alone. This has been the opinion of every committee; before whom the sole question always is, whether the offence of treating has been made out within the provisions of that statute law. Previously to stat. 7 Will. 3, c. 4, treating was an offence, as we have seen, only so far as it constituted bribery: but since that act, to adopt the language of Mr. Austin, in argument,* “a *new substantive offence* has grown up under the denomination of **TREATING**”—since, as we have seen, recognized by the legislature — “entirely distinct from bribery at common law; and the legal definition of bribery has become inapplicable to the statutory offence of treating.”

There is, therefore, no reason for the suggestion that the *Carlisle* Committee may have thought that the treating mentioned by them in their resolution† was an offence against the *common* law, by which the election could be avoided; and it also follows, from the terms in which their resolution is found, that there was no offence against the statute law; and, consequently, the election ought not to have been held void.

If, indeed, the committee had been of opinion that the allegation in the petition was proved—that “extensive and systematic bribery and corruption had taken place at the election, by which the result of it had been influenced, and that consequently the election was void, no one could have disputed the soundness of such a decision, by whomsoever—whether by the candidate,

by the decision of the Select Committee, and, after a contest, was returned; no one alleging, at the election, that he was disabled and ineligible, nor was any petition presented against him.

* *Cambridge*, Barr. & Arn. 182.

† The expression that Mr. H. was “*by his agents*” guilty of treating, may perhaps be taken, *per se*, to mean that what the agents so did, was done without the authority of Mr. H. This is the language which is ordinarily used by committees, when they mean to find that the acts done by the agent were done without the authority of the candidate. Where it is intended to bring the case *within* the stat. 5 & 6 Vict. c. 102, s. 22, the Resolution may be worded like that in the *Lincoln* case — Printed Minutes, p. 62 [1848]:—

“That Charles Seeley, junior, did, directly and indirectly, permit and *knowingly allow* to be provided, *wholly or partly at his expense*, drink and entertainment for several persons before the election, for the purpose of corruptly influencing such persons to give, or refrain from giving, their votes at such election.”

agents, or indifferent persons—such acts had been committed. The committee, however, have expressed no such opinion, and their resolution is strictly confined to treating, which, as has been already observed, has now only a definite statutory meaning.

If it be a correct view of the case, that acts of treating committed by an agent, without the knowledge, authority, sanction, or recognition, and not at the expense, of the candidate, does not subject him to the disabilities and disqualifications of the two treating statutes now in force, it constitutes a great distinction between the cases of treating and bribery. Whether it would be desirable to declare by an enactment, that the statutes of treating should so far apply to acts of treating by agents unknown to and unsanctioned by their principals, as to render an election void, may admit of consideration.*

It has already been observed,† that treating is not within stat. 4 & 5 Vict. c. 57; where, though the word “bribery” occurs five times within the single section constituting the act, the word “treating” is not to be found at all, it having been struck out from the bill as originally framed, and by which it had been intended to declare treating *bribery*.‡ Treating a particular voter, however, in order to obtain his vote, is an act of bribery; and, as such, comes within the operation of the act, and may consequently be gone into previously to proof of agency. This was a carefully-considered decision of the *Cambridge Committee*,§ and has been adopted by other committees. It was said by Mr. Austin, in the *Lyme Regis* case,|| that from the time of the resolution of 1677 down to the present, there had not been a single instance of a vote being struck off the poll on the ground that the voter had been *treated*. In the case then under consideration, the vote was struck off, without hearing the reply of the opposite counsel. The learned reporters say in a note, that the committee “probably grounded their resolution upon the evidence of bribery;” and in another place, that “the evidence of bribery was one of fact only:”—

* Pickering's Controverted Elections, pp. 26, 27, note.

† Ante, p. 502.

‡ Barr. & Aust. 115, note.

§ Barr. & Arnold, 184.

|| Barr. & Aust. 530.

but that must mean, that the bribery consisted only in “*treating*” the particular elector whose vote was struck off. And, in fact, there can be no doubt whatever that treating may constitute bribery, whether considered with reference to either common or statute law.

Since by statute 5 & 6 Vict. c. 102, s. 22, it is made an essential ingredient in the law of treating, under that act, that it was “wholly or in part *at the expense* of the candidate or member,” no case of entertainment by others, unconnected with him by the link of agency, can be available to affect his seat. This is the view taken of it by Mr. Rogers. “All treating by relations, political friends, or clubs, is at once excluded”*—and that, it may be added, whether before, during, or after the election;—while the statute of Will. 3 cannot affect what took place before the teste of the writ, or after the election. Nevertheless, the common law of parliament is competent to deal with a fitting case for its interference, though not accessible by either of the statutes in question. If a petition were to be presented, complaining that a particular election had been carried by open, notorious and extensive treating, what is to prevent a committee from declaring the election void—sworn as they are “well and truly to try the matter of the petition referred to them”—though the evidence should fail to connect such proceedings with the sitting member, or his agents? The committee could not fail to see that one so returned to parliament had not been “freely and indifferently elected,” a matter which it is their paramount duty to examine into and determine. In the *Ilchester* case,† it was held, that where a conspiracy had been entered into for the purpose of corrupting a borough, though the committee expressly negatived any knowledge of the fact

* Rog. on Elect. 265.

† Ante, p. 417, et seq.; 1 Peck. 302 [A. D. 1803]. In this case it was decided that neither the sitting members nor petitioners were duly elected; but that the former, though not guilty of bribery by themselves or their agents, had by themselves or their agents been guilty of treating; that the election was void:—that such a system of corruption was formed, previous to the election, to influence it, as to require the interference of the House. The names of two gentlemen were then mentioned as those “engaged in the system of corruption;” the resolution was reported to and adopted by the House; the Attorney General was directed to prosecute the two offenders; they were convicted, and sentenced to a year’s imprisonment in the King’s Bench prison.

on the part of the sitting member, evidence was allowed to be given of the corrupt proceedings, to avoid the election.

Finally, it has been already stated, that treating was originally included, as it had been in the year 1841, in the Bill which afterwards became statute 4 & 5 Vict. c. 57, in statute 15 & 16 Vict. c. 57, passed in the year 1852, but was excluded in both instances; in the latter case, with an intimation by the Lord Chancellor, that treating might advantageously form the subject, from its difficulty and importance, of a separate bill.

From the extended account which has now been given of the existing law relating to bribery and treating, it may appear that parliament is invested with ample, if not even amply sufficient powers, to deal with that opprobrium of the age, the system of bribery and treating, on whatever scale, and by whomsoever it may be practised. There is no doubt or difficulty as to what constitutes bribery, though some little appertains to the subject of treating; but there is little as to the parliamentary effects of either, upon candidates properly held responsible for it, as having been either personally guilty or having employed agents resorting to it in order to obtain a short-lived apparent triumph, fraught with bitter and enduring mortification, in the shape of a nugatory election and return, declared such at the earliest opportunity, by parliament itself. Not only is that particular return void in the case of both bribery and treating, but very serious parliamentary disabilities for the future, attach to those declared guilty of either; and in the case of bribery, ruinous penalties ensuing on a conviction in a court of law. Whether bribery and treating should be placed in all respects on the same footing, with reference to inverting the order of proof, to the liability for the acts of agents, and disability extending through the entire parliament,—or even further, whether to any specified number of parliaments, or even for life,—are questions demanding deliberate and dispassionate consideration.

The bribed voter is already subject to perpetual disfranchisement, to the penalty of five hundred pounds, and to fine or imprisonment, or both, if proceeded against criminally and convicted.

Attempts to withdraw guilty cases from the scrutiny of parliament, are rendered hopeless by the statute 5 & 6 Vict. c. 102,* but as it has been observed that this act is comparatively inoperative, because it does not affect the seat obtained by the guilty means brought to light by the act, the section by which that stimulus is destroyed,† might probably be advantageously repealed;—but such a step requires the utmost circumspection, lest honourable and *bonâ fide* returned members should be subjected to indefinite and protracted oppression; and that not by innocent, but mercenary and guilty parties trading on their victim's fears.

If the investigation of select committees succeed in developing systematic corruption in a constituency, the House has ample powers to deal with it; and if of long standing and inveterate, then those of the Corrupt Practices Act‡ can be called in aid. As that act, however, does not in law extend to the form of corruption existing under the name of treating, the legislature may perhaps deem it expedient to deal with that case. If so, it may be well to adopt some decided policy in respect of peremptorily prohibiting everything in the shape of refreshments and travelling expenses, or allowing them, under perhaps discoverable limitations, at once practicable and efficient. Every experienced legislator, every one, even only tolerably familiar with the administration of election law by select committees, will acknowledge, however, the difficulty of enacting a law that shall work satisfactorily. On one hand, the allowance of refreshment and travelling expenses might open the door to systematic corruption, eluding discovery or punishment; on the other, the rigorous disallowance of them, and refusal to enter into the question of *object* or *intention*, in order to discriminate between *bona* and *mala fides*, would be practically impossible: and finally, if such inquiries should be allowed, innumerable issues of that kind would be raised before every election committee, and a fearful inducement held out to unscrupulous witnesses.

These things are mentioned for the purpose of in some degree explaining the discrepant opinions expressed in parlia-

* Ante, p. 251; and post, p. 268, A.

† Sect. 13, post, 271, A.

‡ 15 & 16 Vict. c. 57, post, 362, A. a.

ment* on this subject; the varying decisions of select committees on the same states of fact; and even corresponding diversities in the decisions of courts of law.† Sir Robert Peel, on the occasion referred to beneath, stated, that whether it were rational or not to admit this moderate degree of treating," [*i. e.* by two-and-sixpenny refreshment tickets, as in the *North Cheshire* case, 1848, which has been called to the attention of the House‡] was a question which would have arisen equally before stat. 5 & 6 Vict. 102, s. 22, as after—"a question and a difficulty which had been engendered and left unsettled by the state of the law, as it had existed for a hundred and fifty years,"—that is to say, since the statute of Will. 3, in 1695. What, again, is to be done, in the case of refreshments, or entertainments, whether on a moderate or a liberal scale, provided for voters and others, from motives of disinterested hospitality and good feeling, by those who are totally unconnected with the conduct of the election? Is it to be said that a country gentleman shall not, during an election, give a breakfast, or a luncheon to his brother freeholders, and then accompany them, in procession, if they please, to the poll? "If inquiry," said a county member in the House of Commons, in the debate already referred to,§ "is to be made into every case of a gentleman being hospitable to his tenants, where is such an inquiry to stop?"

In the time of Lord Mansfield, (A. D. 1784,) a bill|| was introduced into parliament by Lord Mahon, to prevent bribery, by paying electors for loss of time and travelling expenses. It contained severe penalties and disabilities against those guilty of bribery, and encountered great opposition in the House of Commons. On its reaching the Lords, however, Lord Mansfield secured its rejection by a powerful demonstration of its mischievous interference with the existing law.

"The framers of the Bill," he said, "must have been ignorant of the law as it now stands, or they would never have

* E. g., by Sir Robert Peel and Lord John Russell, 4th August, 1848; Hans. 100, pp. 1154-5.

† E. g., per Alderson, B., in *Bayntun v. Cattle*; 1 Moo. & Rob. 265 (ante, p. 258); per Lyndhurst, C. B., and Bayley, B., in *Hughes v. Marshall*, 1 C. J. 118. Ante, p. 528.

‡ 1 P. R. & D. 223; Hans. 110, pp. 1154-6.

§ Mr. Henley, Hans. C., p. 1155.

|| It was supported by Mr. Pitt, and opposed by Mr. Fox. Tomlin's Life of Pitt, vol. i., p. 79.

thought of such a bill. The crime of bribery is clearly and sufficiently ascertained by the law; for which reason, every bill prescribing new modes of prevention, *tended rather to weaken and contract the law, than to enforce and enlarge it. . . .* The laws in being are fully adequate to the punishment of all colourable and evasive means of corruption, under pretence of paying electors for loss of time." *

These observations of one of the greatest lawyers that England ever possessed, are based upon a profound acquaintance with the principles of the common law; and may be deemed equally applicable now, when such great relaxations and modifications of the law of evidence have taken place, and parliament is invested with such great and unprecedented powers over offending individuals and constituencies.

* 1 Luders, 67, 68 [note c, to the *Ipswich* case].

CHAPTER XXIII.

JURISDICTION OF SELECT COMMITTEES—CONCLUDED.

DEFECTIVE PROPERTY QUALIFICATION OF A CANDIDATE.

FIFTEEN years ago, namely in the year 1838, the legislature substituted for all existing statutes requiring a property qualification on the part of members for England and Ireland, statute 1 & 2 Vict. c. 48;* which enacted that candidates for counties must possess, for a period of at least thirteen years from the time of the election, 600*l.* a year, and for boroughs 300*l.* a year, either wholly in real property, or wholly in personal property, or derived from both together; such property being within the United Kingdom of Great Britain and Ireland.

The professed object of requiring this property qualification, from which the Scottish representatives are exempt, on grounds explained in a preceding chapter,† may be gathered from the recital of the first statute on the subject (9 Anne, c. 5, passed in the year 1710), which is, “An Act for securing the FREEDOM of Parliament, by further qualifying the Members to sit in the House of Commons;” that is, regarding the amount of qualifying property specified in that act, as some guarantee for the *independence* of its possessor, and of his education, and standing in life. The real object of this act, which recites that it had been passed “for the *better preserving the constitution and freedom of Parliament*,” seems to have been, to counteract the ascendancy which the boroughs had obtained over the counties, by obliging the trading interest to make choice of landed men.‡ For this purpose a *landed* estate of

* Post, p. 262, A.; ante, pp. 195. et seq.

† Chap. VIII., p. 195, ante.

‡ 1 Bla. Comm. 175; 1 Roe on Elections, 39.

freehold or copyhold for life, or for some greater estate, was made requisite for both counties and boroughs: and it was, by a subsequent statute,* rendered necessary for the qualification to be *sworn to*. Mr. Hallam † observes, that “this law is notoriously evaded;” and that “though much might be urged in favour of rendering a competent income the condition of eligibility, few could be found at present to maintain that the freehold qualification is not required both unconstitutionally, according to the ancient theory of representation, and absurdly, according to the present state of property in England.” In the year 1852 ‡ it was proposed by Lord John Russell and others, to repeal statute 1 & 2 Vict. c. 48, and thereby place members for England and Ireland on the same footing as those for Scotland, on the ground that the objects aimed at by the act were not gained; especially that the evasion of them was easy and notorious; and that their real operation was to deprive the House of Commons of the services of many gentlemen of great ability and the highest character, who would not compromise themselves by adopting fictitious qualifications; while persons of a contrary character, having no such scruples, found their way into the House with facility, as mere mercenaries and adventurers. Such reasons, however, were ineffectual. It was urged that to dispense with all property qualification would open the door to bankrupts, spendthrifts, and paupers, unfit to be members of any legislative assembly, especially one dealing with such vast pecuniary interests as the House of Commons.§ The act consequently remains in force. Its practical operation, as far as relates to the jurisdiction of Select Committees, is as follows:—

“The election and return” of any one not thus qualified at the time of such election and return, “are void.” ||

“At the time of the election,”—which means, at any time before the poll closes, ¶ “or at any time before the day named in the writ of summons for the meeting of Parliament,” on a *reasonable written request* made to any candidate, by, or on

* 33 Geo. 2, c. 20, sects. 1, 2.

† 3 Constit. Hist. 402, 403, (2nd ed.)

‡ Ante, p. 26.

§ Ante, p. 3.

|| Sect. 1.

¶ Rogers on Elections, 80, note (a). And see *Aylesbury* (1848), Printed Minutes, 156.

behalf of, any other candidate,* or by any two or more registered electors *having a right to vote at such election*,—signed by such candidate, or two or more electors,—the candidate of whom the request is made, must, within twenty-four hours,—and before the returning officer at the election, or a commissioner appointed for the purpose, “or *any* justice of the peace within the United Kingdom of Great Britain or Ireland,”—make and subscribe a DECLARATION “to the purport or effect” of that contained in the third section of the act.† A *wilful* neglect or refusal to do so, avoids the election. Before a person returned can sit or vote, after the election of a Speaker, he must deliver in to the Clerk of the House, at the table of the House, while it is sitting there with the Speaker in the chair, a paper signed by him containing such a “statement” of the qualifying property as he might have made on being requested to do so by the candidate or electors already mentioned; and must at the same time make and subscribe a declaration that he “solemnly and sincerely declares that he is, to the best of his knowledge and belief, duly qualified to be elected a member of the House of Commons, according to the true intent and meaning” of statute 1 & 2 Vict. c. 48,—and that his qualification to be so elected is as set forth in the paper, signed by him, and then delivered to the Clerk of the House of Commons. If he then know this declaration to be untrue, in any material particular, he is guilty of a misdemeanor; and if he sit or vote [after the election of Speaker] as a member of the House of Commons, before he has delivered in the paper, and made and subscribed the declaration above mentioned, his election is void, and a new writ will issue to elect another member in his room.‡

These are the requisitions of the only statute now in force “relating to the qualification of members to serve in Parliament;” and those of them with which the Select Committee is concerned are—when these matters are challenged by petition—the intrinsic sufficiency of the qualification; the correct spe-

* Except for the universities of Oxford, Cambridge, or Dublin; or in the case of the eldest son or heir-apparent of any peer or lord of parliament, or of any person qualified under the act 1 & 2 Vict. c. 48, to serve as knight of the shire.

† Post. p. 264, A.

‡ Sects. 3, 6, 7, 8, 9.

cification of it by the candidate; and his doing so within the time limited for that purpose.

As to the first of these—the *intrinsic sufficiency* of the qualification—it were idle to attempt to lay down rules upon the subject; since the *property* consists of every kind that exists, real or personal, legal or equitable,—of “any tenure whatever.” The validity of instruments, and the nature of the title which they purport to disclose, as well as the pecuniary value of the property, depending upon charges, and which may reduce it, though ever so little, below the statutory standard,—all these matters are necessarily discussed before the Select Committee, exactly as they would be discussed in any court of law or equity, even up to the House of Lords on final appeal. As to the property being “*situate*” or “*within*” the United Kingdom of Great Britain and Ireland, it was decided by the *First Harwich* case [A. D. 1848], that an annuity of 1000*l.* from the Bengal Civil Service Annuity Fund, conferred no qualification under the act, on the ground that the fund out of which the annuity was paid, was situated, not in the United Kingdom, but in India.* Almost every conceivable question, in short, which can affect the quality, or amount of interest, in real or personal property, may be raised in determining the intrinsic sufficiency of the qualification.

As to the second point—the *correct specification* of it by the candidate, is equally important to his interests. It is obvious that were this not so, the act would be illusory, as far as related to information being supplied, at the time when required, by a rival candidate, and the electors. An instance of the particularity insisted on in these cases, may be seen in the *West Gloucestershire* case † [A. D. 1848], where the sitting member, having, in his declaration, stated that a portion of Bank Stock belonging to him under his marriage settlement, was invested in the names of *three* trustees, he was not allowed to prove that it stood in the names of *two* only.

The reason why the declaration must be thus specific,—as will be seen in the form given in section 3,—is, because it is to that alone that those must look, who are interested in testing its sufficiency. To enable them to scrutinize it, he must state precisely the local situation of the *lands*—the county, barony,

* Ante, p. 196; Printed Minutes, *passim*; P. R. & D. 292.

† Printed Minutes, *passim*; P. R. & D. 13.

parish, township, or precinct—in order that they may be looked at; and also his estate in either of them, or the rents and profits issuing out of them; and in the case of *personal estate or effects*, he must state of what nature, *and where situate*, they are; and what interest he has in them; and on what security; and in whose names the same are vested.* These are the minute requisites prescribed by the act of parliament, which requires a declaration “to the purport or effect” of that contained in it, and which must be adhered to as closely as possible. When the truth or sufficiency of the declaration is questioned before the Select Committee, the *onus* lies on the petitioners, in the first instance, to impeach, and not on the sitting member to substantiate, his qualification.†

As to the third point. It must be shown that the sitting member, on being duly requested in writing, by properly-authorized parties, at the time of the election, or at any time before the day named in the writ of summons for the meeting of parliament, WILFULLY neglected or refused to make or subscribe the required declaration within twenty-four hours after the “reasonable” request had been made to him for that purpose. That request must be reasonably distinct in its terms; must be in writing; signed by the candidate; or, at least, “two *registered* electors HAVING A RIGHT TO VOTE AT SUCH ELECTION.” If, therefore, the sitting member can disprove such right on the part of one, or both of only two, he will defeat the object of the petitioners: and it will be for them to establish that right. The request must be made in sufficient time to admit of twenty-four hours elapsing, within which it may be complied with—that is, before the time of closing the poll, or the day of the meeting of parliament. And the request must be in other respects “reasonable,” so as not to take the sitting member by surprise, or at a disadvantage, in making and verifying it. As their request must be ‘*reasonable*,’ so his refusal or neglect to comply with it must be “*wilful*,” in order to avoid the election and return: and of that reasonableness, or wilfulness,—each possibly depending on the existence of the other—it will be for the committee to judge: but they would, doubtless, require decisive evidence before declaring the election

* Sect. 3.

† *West Gloucestershire*, Printed Minutes; P. R. & D. 11.

void on the sole account of that refusal. One case in the books illustrates the principle of *reasonable* notice being required. As a candidate may be proposed and elected without his knowledge and consent, it would be manifestly absurd to require him to declare his qualification. As, again, a candidate may be proposed in his absence,—even while he is abroad, and possibly also without his knowledge,—those who propose him cannot be called upon to make a declaration of his qualification. In 1781, there were two candidates for the borough of Colchester, Potter and Affleck, the latter being a naval officer abroad. The former was returned, and the supporters of the latter petitioned. When the sitting member opened his defence, he called on the petitioners to produce the qualification of Affleck, who was still serving abroad: but they contended that, under such circumstances, they ought not to be required to produce the qualification. At the close of the sitting member's case, the question of qualification was again argued at great length: and after three days' deliberation, the committee resolved that, as Affleck had been abroad at, and ever since the election, the sitting member should not be permitted to go into his qualification: and they declared Affleck duly elected.*

The first section of stat. 1 & 2 Vict. c. 48, enacts, that no person shall be “capable of being elected,” unless qualified under that act: and that ‘if any person who shall be elected or returned, shall not, at the time of *such election* and return, be qualified’ as in that act mentioned, ‘*such election* and return shall be void.’ It would seem, therefore, that provided a candidate be so qualified at any time before the poll closes, he satisfies the statute. On the construction of stat. 9 Anne, c. 5, it was held that a person “seised of or entitled to such an estate” at any period of the election, was sufficiently qualified. In the Bristol election, Mr. Cruger's qualification was executed during the poll: and an objection taken on that ground, was overruled.† Thus a candidate, when requested to declare his qualification, may be unable to do so, as having none: yet he may have acquired it the moment before handing over the declaration which he had been requested to make. The words of the declaration given by the act are—“I do so-

* 3 Luders, 166, 167. Of course Commodore Affleck would be unable to *take his seat*, without duly swearing to his qualification.

† *Bristol*, Simeon, 51; *Bath*, K. & O. 27 [A. D. 1833].

lemnly and sincerely declare, that I AM, to the best of my knowledge and belief, duly qualified." He may never be required at all to make any such declaration, by either his rival candidate, or any electors:—but before he takes his seat, as a member, he must make the same declaration—"I AM," &c. "duly qualified." The words are not—"that at the time of my election I was, and now am duly qualified:" but that due qualification is "according to the true intent and meaning" of stat. 1 & 2 Vict. c. 48: which declares that no one shall be capable of being *elected*, unless qualified under that act; and that if not *so* qualified *at the time of his election*, it and the return are void. If, therefore, a candidate be unpossessed of a qualification when the poll opens, and remains so till after the poll has closed, the election is void. But can votes given for him, under such circumstances, be considered thrown away? Whether voters know, or do not know, that at the moment of their voting for him, he is ineligible, their votes cannot cause him to be duly elected, for the statute declares that he is incapable of being elected, and his election and return are void. To construe their votes as thrown away, it must be proved that they wilfully voted for one whom they knew to be incapable of being elected. He may have been ineligible when the first votes were given for him, but become eligible before the close of the poll: he is not "elected" or chosen, till he has the majority of voices; and if, when he has that majority, he be duly qualified, the statute is satisfied. Where is the law that prescribes any length of time *before* the election, for his being so qualified? If it had required him to possess the requisite qualification when he was first nominated, or before the election commenced—that is, before any vote had been, or could be, legally recorded for him,—the case would have been different; but no statute says that he shall be *then* so qualified. Perhaps the true way of looking at the case is, to regard a man who does not possess the proper qualification at the commencement of the election, to be inchoately incapable—the incapability being consummated by his remaining destitute of the qualification at the close of the poll. There is nothing, therefore, inconsistent with principle, or unreasonable, in holding that, under such circumstances, there is an actual existing disqualification from the commencement to the conclusion of the poll, as conclusively evidenced by the state of facts at the latter period. If, then, the electors have full notice given them

before recording their votes, that a particular candidate is ineligible as not being duly qualified, on the principles laid down in a preceding chapter, they must exercise their discretion, and abide the result: which may show that they had been right, or that they had been wrong, in recording their votes as they did, or in abstaining from doing so.

In the *Tavistock* election,* there were three candidates† for two vacancies, B., C., and P. The nomination was on the 7th July, 1852; and at the close of the poll on the ensuing day, the numbers were, for B. 220; C. 169; P. 104: on which the two former were declared elected.

P. petitioned against the return of C., and claimed and obtained the seat; on the ground that C. had been incapable of being elected, for want of qualification; and that due notice of the fact had been given to the electors. The petition‡ stated the fact of his being ineligible on that ground; that immediately after the petitioner had demanded a poll, C. was duly required by him to make and subscribe a declaration of his qualification; that some time before the poll commenced, on the ensuing morning, “due notice was publicly given to the electors that the qualification of the said C. *“had been duly questioned, and would be impeached before a committee of the House, and, therefore, that all votes given for C. would be thrown away, and the said voters were cautioned to inform themselves of the validity of the said C.’s qualification before they voted.”* That on the evening of the day preceding, and on the morning of the polling, and before it had commenced, a handbill was circulated, published, and posted by C. in the borough, of which the following is a copy: “Mr. P.’s last effort. Mr. C.’s qualification having been questioned by Mr. P., Mr. C. hereby positively assures the electors that his qualification was regularly deposited in the Crown Office previous to his taking his seat in the House of Commons, and is ready to be exhibited to any one

* The Committee sate in February, 1853.

† A third, T., had been proposed, but not seconded, and polled a single vote. No notice was taken of him in the petition, though the poll-books had been ruled for *four* candidates, and this was made an objection to the petition. The solitary voter divided his vote between T., and P., the petitioner. The committee overruled the objection.

‡ Appendix to Votes, p. 2, Friday, 12th Nov. 1852. This petition is very ably and carefully drawn, and will be found inserted in the Appendix, No. 22.

who has a right to demand it." That before the polling commenced, C. read this aloud in the polling place, and handed a copy of the handbill to the returning officer, together with a declaration purporting to be in the terms of the act. That the poll having commenced, "due notice was given on the part of the petitioner to several electors, who first tendered their votes for C., that his qualification had been duly questioned, and would be impeached before a committee of the House; and they were severally personally cautioned to inform themselves of the said C.'s qualification before they gave him their votes; and that if they gave their votes for the said C., their votes would be thrown away." That thereupon a discussion ensued between P., C., and the returning officer, and it was agreed, especially by C., that such notice or caution should not be personally repeated to each elector; but that the same should be understood to have been given to each elector throughout the election. That printed notices of C.'s want of qualification were affixed on each side of the door of the polling place, some time before the polling commenced, and visible to every elector, as he came up to vote, and continued so affixed, up to the close of the poll; and other copies were also affixed to the hustings and other conspicuous places in the borough, and continued so affixed up to the close of the poll; and that the said warning and notice were well known and notorious to all the electors both before and during the time of the election. The petition then proceeded to negative, in the ordinary terms, the possession of the qualification, enjoined by the statute, and asserted that, in consequence of such want of qualification, his return was void; that before the poll was declared, P. protested before the returning officer against C.'s being returned, by reason of his not being entitled to be so returned for want of being duly qualified; that the returning officer then declared he was returned subject to such protest; that, on the polling day, P. continued his protest by writing and delivering a letter to the returning officer, desiring him, on making his return, to notice specially the fact of P.'s protest against C.'s qualification, and that the return had been made subject to such objection; that such letter was appended to the return made by the returning officer to the sheriff; that the returning officer duly certified the making before him of the declaration by C. on the 8th July; that that declaration was vague, uncertain, and did not suffi-

ciently state the nature of the qualification of C., as required by the act, and was defective and insufficient in various specified respects; that C. thereby did wilfully refuse and neglect to make and subscribe, within twenty-four hours after the request of P., such a declaration as was required by the act, whereby his election and return were null and void, and the votes given for him were thrown away; that P. had been informed, and truly believed, that the declaration of qualification returned in by C. at the table of the House, was other and different from that made by him at the election; that P. ought to have been, by reason of the premises, returned as duly elected, instead of C.;—and the prayer was—that C. might be declared not duly elected, and that he ought not to have been returned; that P. was duly elected, and ought to have been returned; that the return might be amended by erasing the name of C., and inserting that of P.; and that the election might be declared null and void, so far as regarded the election and return of C.

C. was, on proof of the facts alleged in the petition, declared not duly elected, and P. was seated in his place. The sitting member failed to prove that he had a qualification. It was, at all events, reduced to little more than a nominal one. The annuity deed specified in his declaration was void on many grounds. There was no consideration; there were no conveying words; it was unattested; drawn by C. himself; stamped only the day before the committee sate; and it was clearly proved that the grantor had nothing to grant.

The committee took no notice of the qualification which C. had delivered at the table of the House, regarding only that given at the hustings: but the variation between the two, of course, increased the suspicion attaching to the whole case of the sitting member. It was therefore held by the committee *unanimously* that he had been ineligible at the time of his election and return; that the constituency had been duly put on their guard, and apprised of the fact of ineligibility. In addition to this, C. was admitted to be a fellow-townsmen of the voters; and living among them apparently not in circumstances of affluence. His election and return were therefore set aside, and the petitioner declared duly elected.

Had any precedent been required, one almost precisely in point existed in the *Cork County* case, in 1835,* in which the

* K. & O. 391.

sitting member, Mr. Feargus O'Connor, was unseated, under the provisions of stat. 7 Anne, c. 5. Again, in the year 1838, immediately before the passing of the statute now in force, in the *Belfast* case,* the sitting member was petitioned against on the ground of disqualification. The notices served on the electors "were to the effect, that the parties signing them were '*advised*' that Mr. Gibson," afterwards sitting member, "was disqualified." These notices were not published till mid-day, on the second day of the election, when also five hundred placards were printed, and placarded all over the walls of the town, and on the court house where the polling took place. It was successfully contended that votes given after this, for Mr. Gibson, were thrown away; and after they had been struck from the poll, so that the two petitioners were in a majority, after an unsuccessful attempt to impeach their qualifications, both were declared duly elected instead of the two sitting members.

* F. & F. 600, 603.

CHAPTER XXIV.

AGENCY.

WE have now travelled leisurely through the extensive province of a Select Committee's jurisdiction in respect of an election petition:—a jurisdiction independent of the House, and conclusive upon the question.* There remains to be considered virtually only one topic more (except that of practical procedure, though very important; and it is generally divided into two, for the purpose of convenience, under the heads of AGENCY and EVIDENCE. That topic really consists of the machinery, so to speak, by which the facts of any given case are brought within the judicial cognizance of the committee. The reason why such special prominence is given to AGENCY, in all Treatises, Reports, and the proceedings before Select Committees which those Reports record, and those Treatises methodize, is, that it is in almost every case through the medium of agency, that the parliamentary consequences of Bribery and Treating are sought to be attached to a candidate at an election. He is rarely so imprudent as *personally* to interfere in such discreditable and dangerous transactions; or, if he do, to allow proof of such interference to exist. It is practically impossible for him to conduct his election himself, individually and exclusively; and he must, therefore, have assistance. If, for that purpose, he appoint a hundred agents, he simply multiplies himself a hundred times, in order that he may be present in a hundred different places at once. He must, however, take good care whom he thus constitutes an *alter ego*; or he may literally ruin *himself*, as far as regards his parliamentary interests. Lord Eldon once said in one of his luminous judgments in partnership cases (which are resolvable into *agency*), that “where a man

* 1 Luders, 404, note. Per Sir William Grant, M.R., 1 Peck. Introd. xxiv.

took a partner, he took him for better and for worse, as in marriage, and must abide by it. He commits his best and dearest interests to the tender mercies of a stranger." It is thus, indeed, with the parliamentary principal and his agents. In their persons he may have a sort of ubiquity; but it behoves him to be ubiquitously prudent. A single unauthorized act by himself, to himself even unknown, by one of these representatives of himself, and the whole fabric of his proud aspirations is suddenly melted into thin air, and all his sacrifices, exertions, and anxieties have insured him only bitter disappointment, mortification and humiliating disabilities for the future. He who derives the advantage, says the law, ought to sustain the burthen;* and the benefits of agency are, on grounds of public policy already explained, linked with liability, in the case of a *parliamentary* principal, far beyond that imposed on an ordinary principal and agent.

The present chapter is devoted to the cardinal subject of *agency*, but it must necessarily trench on a great portion of the ensuing one appropriated to *evidence*: for while the doctrine of agency is fixed, the existence of those facts which require its application, depends on the view taken of the circumstances of every particular case, as *evidenced* to the tribunal which has to deal with them. A terse and elegant observation of Lord Tenterden with reference to the law of contracts,† is exactly applicable to that of agency; and substituting the one word for the other, will run thus:—

"There is no difference between an implied and an express Agency, except as to the mode of substantiating it. An express Agency is proved by an actual agreement [or appointment]; an implied Agency, by circumstances: as, by the general course of dealing between the parties. But whenever an Agency has once been proved, *the consequences resulting from it must be the same*, whether the Agency had been proved by direct or circumstantial evidence."

The relationship of principal and agent once established, it may be said, that before a competent tribunal, the rest follows; as though its eye saw the source of a stream, and traced the waters flowing through a thousand channels, smaller and greater,

* *Qui sentit commodum, sentire debet et onus.* 2 Inst. 489. See Mr. Broom's *Maxims*, 552, (2nd ed.)

† See it quoted, ante, p. 444, note; *Massetti v. Williams*, 1 Barn. & Adol. 423.

nearer and more remote. Thus it is with the current of blended representation and responsibility, issuing from the principal, and flowing through his immediate, down to his most distant sub-agent.

What, then, is the legal distinction of an *agent*? *He who is appointed by another to do anything in his stead.** The relation thus created, is called an agency; and the *power* thus delegated, an authority. The extent of that authority depends upon the nature of that agency, which may be general or particular, limited or unlimited, at the pleasure of the principal. A *general* agent is one whom a man puts in his place, to transact all his business of a particular kind; a *particular* agent, is one employed specially in one particular transaction. The distinction between the two cases cannot be expressed more distinctly or correctly than in the language of that able lawyer Mr. Justice Buller:—

“If a person be appointed a general agent, the principal is bound by his acts; but an agent constituted for a particular purpose, and under a limited and circumscribed power, cannot bind the principal by any act in which he exceeds his authority: for that would be to say that one man may bind another against his consent.”† It may be added that a general agency is constituted, not by the authority which the agent actually receives from his principal, but by that which the latter *allows the agent to assume.*‡

The rights and liabilities respectively acquired and incurred, by principal and agent between themselves, and between either of them and third parties, have been consistently determined with the utmost nicety, by courts of justice, in a vast number of particular combinations of circumstances; yet cases are daily and hourly arising which fall, or seem to fall, within none of these determinations: requiring a clear perception of principle, and a knowledge of previous modes of applying that principle, in order that they may be dealt with justly, and according to law.

The essence of agency is REPRESENTATION: that is, one man's being put in the place of another, by that other.

* Comyns' Digest, “Attorney,” A.

† *Fenn v. Harrison*, 3 T. R. 762.

‡ Russell on Factors and Brokers, p. 76.

There are four ways by which the existence of this critical relationship may be determined.

First,—By direct proof: as by either principal* or agent being called to prove, in point of fact, that the latter was authorised, by the former, to do the particular act, or transact the particular business in question.

Secondly,—The authority of an agent may *result from the relative situation* of the parties.

Thirdly,—The authority may be evidenced by their habits and course of dealing, or other circumstances.

Lastly,—It may be evidenced by, or inferred from, the principal's ratification or acquiescence.

When, by any of these *media*, the fact of agency has been proved, either expressly or presumptively, the act of the agent, *co-extensive with the authority*, is the act of the principal;—and THEN, whatever the agent DOES or SAYS, within the scope of his authority, the principal does, and the principal says. Evidence may THEN be given of such acts and declarations, exactly as if they had been done and made by the principal himself personally;—and as to such a declaration, it makes no difference,† moreover, whether it be *true or false*; for it is just as binding on the principal, as if it had fallen from his own lips. Were this not so, the affairs of mankind would be subject to much derangement.

It cannot be too constantly borne in mind that no representations, declarations, or admissions of an agent will bind his principal, except in cases within the scope of the authority confided to him; subject, however, to the distinction between general and limited agents. For wherever the *acts* of the agent will bind the principal, there his representative's declarations, and admissions respecting the subject matter, will also bind the principal, if made AT THE SAME TIME, and constituting part of what is technically called the *res gestæ*, or transaction.‡ They are of the nature, then, of original evidence, and not of hearsay: the representation or statement of the agent, in such cases, being

* See stat. 14 & 15 Vict. c. 99, rendering *parties* competent and compellable to give evidence for or against each other.

† 2 Stark. Evidence, 45 (3rd ed.).

‡ Story on Agency, s. 134, where a great number of English and American decisions are cited to support these propositions.

the ultimate fact to be proved; and not intermediately an admission of some other fact.* The admission of the agent, however, cannot always be assimilated to that of the principal. The party's own admission, whenever made, may be given in evidence against him: but the admission or declaration of his agent, binds the principal only when it is made during the continuance of the agency, in regard to a transaction then depending, *et dum fervet opus*. It is because it is a VERBAL ACT, and part of the *res gestæ*, that it is admissible at all; and therefore it is not necessary to call the agent himself to prove it.† “I should be sorry to have it laid down,” said Mr. Justice Chambre, “as a general rule, that agency must be proved by the agent himself.” Wherever what the agent *did*, is admissible in evidence, there it is competent to prove what he *said* about the act while he was doing it; and it follows, that where his right to act in the particular matter in question has ceased, the principal “can no longer be affected by his declarations; which have then become mere hearsay.‡ “With regard to acts done,” said Sir William Grant, in the well known case of *Fairlie v. Hastings*, § “the words with which those acts are accompanied, frequently tend to determine their quality. The party, therefore, to be bound by the act, must be affected by the words: but except in one or other of those ways, I do not know how what is said by an agent, can be evidence against his principal. The mere *assertion* of a fact cannot amount to *proof* of it, though it may have some relation to the business in which the person making that assertion was employed as agent. If any fact material to the interests of either party rest in the knowledge of an agent, it is to be proved by his TESTIMONY; not by his mere assertion.” It is of the greatest practical importance not to confound declarations which are mere hearsay, with those admissible as original evidence, in virtue of their connection with *the principal fact* under investigation. The affairs of men consist of a complication of circumstances, so intimately interwoven as to be hardly separable from each other. Each owes its birth to some pre-

* 1 Phill. on Ev. 381.

† Taylor on Evidence, s. 411; *Doe v. Hawkins*, 2 Q. B. 212.

‡ See Tayl. on Ev. s. 411, and cases cited ib.

§ 10 Ves. 126-7.

ceding circumstance, and in its turn becomes the prolific parent of others; and each, during its existence, has its inseparable attributes, and its kindred facts, *materially affecting its character*, and essential to be known, in order to a right understanding of its nature. These surrounding circumstances must always be considered along with the principal fact, provided they constitute parts of the *RES GESTÆ*; and whether they really do or do not must be determined, in each particular case, by the exercise of a sound discretion, according to the degree of relationship which they bear to that principal fact.* Thus, on the trial of Lord George Gordon, for treason, the *cries of the mob* accompanying him on his enterprise, were received in evidence, as forming part of the *res gestæ*, and showing the character of the principal fact.†

It may be observed, again, that no man can prove himself another's agent, solely by *saying* that he is such, or was at any time, or in respect of any transaction. Agency cannot, of course, be proved by the mere declaration of the professed agent, or every man would be at the mercy of every other man: but agency must be proved by *acts done*, or admissions of the principal, whether evidence of such acts, or admission, be given by the agent, or any other person.

Finally, it may be considered, that the essential doctrine of agency depends upon three grand maxims.

I. A transaction between two parties, ought not to operate to the disadvantage of a third. *Res inter alios acta, alteri nocere non debet*. This rule prevents a person from being concluded or affected, directly or indirectly, by the acts, conduct, or declarations of STRANGERS. On a principle of good faith and mutual convenience, a man's own acts are binding on himself, and are, as well as his conduct and declarations, evidence against him;—but it would not only be highly inconvenient, but also manifestly unjust, that a man should be bound by the acts of mere unauthorised strangers, of whom he has no knowledge, and over whom he has no control; and if a man ought not to be bound by the acts of strangers, so neither ought their

* Per Parke, *Rawson v. Haigh*, 2 Bing 104; *Ridley v. Gyde*, 9 Bing. 349, 352; Taylor on Ev. s. 395.

† 21 How. State Trials, 514, 529.

acts, or their conduct, to be used as evidence against him.* The fact, for instance, that certain persons bribed voters, in the name of A., is no proof against A.; for the acts may have been purely gratuitous,—or even the contrivance of an opponent.

II. He who does an act through the medium of another party, is in law considered as doing it himself. *Qui facit per alium, per seipsum facere videtur.*

“This, said Chief Justice Tindal,† “is a maxim of almost universal application.”

III. A subsequent assent, or ratification, has a retrospective effect, and is equivalent to a prior command.—*Omnis ratihabitio retrò trahitur, et mandato priori æquiparatur.*

Such assent or ratification may be either express or implied, and inferred from the principal's conduct. The strongest evidence of such assent or ratification, is his profiting by what has been done; and very slight circumstances may suffice to satisfy those judging of the matter, that he knew, when thus reaping, *whose servant had sown.*

“No maxim is better settled, in reason and law,” said Mr. Justice Story, “than this maxim,—at least when it does not prejudice the rights of strangers.”‡

To these, then, may, for our present purposes, be added a fourth—

IV. Let the principal answer—at least CIVILLY, *Respondeat superior.*

The special significance of this rule, in its application to electioneering agency, may appear to those who have read the foregoing chapters on bribery and treating.

The just and discreet application of these great legal principles, to the facts on which a Select Committee has to adjudicate, is a matter of infinite concernment to the public. Undue stringency is equally pernicious with undue laxity. Either may occasion a grievous miscarriage of justice, in the particular instance, and prejudice to the public interests,—by, on the one hand, affording impunity to corruption; or on the

* 1 Stark. Evidence, 58, 59 (3rd ed.); Broom's Max. 735-6 (2nd ed.)

† *Cuming v. Toms*, 8 Scott, N. R. 830; S. C. 7 M. & G. 32.

‡ *Fleckner v. United States Bank*, 8 Wheaton, 363; Broom's Maxims, 735, 643, 676.

other, depriving the state of the services of its best citizens, who will not offer those services, under the risk of unreasonably perilous liability, and unjust discomfiture and ignominy.

The faint, but it is believed correct, outline of the law of agency above exhibited, may be regarded, it is hoped, with interest and advantage, by any one reflecting that he is weighing the principles on which enlightened courts of justice are everywhere daily and hourly regulating the most important transactions of mankind, submitted to their adjudication. These principles are common to the ancient Roman law, to the law of Continental Europe, the United States of America, and to England. "To the latter, however," says a late distinguished American jurist,* "we are indebted, not only for the fullest and most comprehensive exposition of these principles, but for the most varied and admirable adaptations of them to the daily business of life." It cannot, therefore, be deemed a work of mere supererogation, to bring them distinctly under the notice of members of the House of Commons, exercising, with final effect, such important judicial functions.

A careful consideration of the reported decisions of Select Committees, since their establishment under the Grenville Act, in 1770; † from the days of Douglas, Luders, and Peckwell,—those truly excellent reporters,—down to our own, will satisfy any competent person of the supreme importance of ever keeping constantly in view the fixed principles of agency. Nearly three-fourths, if not more, of these cases depend entirely upon the application of these principles; and no well-trained member of parliament, or lawyer, can fail to note many cases running to either extreme: in some, no imaginable amount of evidence seeming sufficient to raise even a *prima facie* case of evidence; in others, none being too flimsy to establish it conclusively. Of these, instances will be given in the ensuing chapter. It is, under these circumstances, peculiarly satisfactory to see, on a recent occasion, the experienced chairman of a select committee ‡ accompanying the announcement of the usual preliminary resolutions, with the following intimation to counsel:—

"That the committee had further instructed him to inform

* Mr. Justice Story. Commentaries on Agency, s. 500, *ad finem*.

† Ante, p. 272.

‡ Aylesbury [1851]; Printed Min. 7; ante, p. 348.

counsel, that they hoped that in conducting their case, counsel would confine themselves, with reference to points, *as far as possible, to the quotation of legal, and not parliamentary decisions.*"

It is not, however, to be understood that all the rules of agency, as administered by the ordinary courts of justice, are to be received in their naked stringency by the Select Committee. It has been already more than once intimated, that considerations of public policy intervene to dictate essential modifications. It does this, because the office of a representative of the Commons in Parliament, is one of great PUBLIC TRUST, attaching to those who seek it, grave responsibilities TO THE PUBLIC.* It would be impossible to effect this object, if a Select Committee were compelled to act on the common law principle, that an agent's WILFUL and wanton tort attaches no liability to his principal, because no authority whatever from a superior can furnish to any party a just defence for his own positive torts or trespasses; for no man can authorise another to do a positive wrong:† and such an act is not properly within the scope of his authority.

A parliamentary tribunal, in short, looks at the relation of electioneering principal and agent, thus.—The former confers on the latter an authority necessarily commensurate with the object in view. "Get me returned," says he to A., "for such a place:" and thereby delegates to him a power of employing all the necessary means for doing so. If, therefore, A. employ B.—and B., C.—and C., D., and so on down to Y., who employ Z.;—if Z. bribe a single voter, the principal is unseated: for the act is regarded as one of those which lay within the scope of that unlimited discretionary power which had been given to A.

A Select Committee knows well, moreover, that as between the principal and his immediate agent A., the latter is obviously the man to be kept most in ignorance—a most studied yet often unsafe ignorance—of any illegal means which may be used to gain the election. That committee, therefore, is little concerned to ascertain what were the precise terms in which the candidate employed A., which may have been nominally, or, in

* Ante, p. 459.

† Story's Agency, § 309. The principal is liable, civilly, to third persons, for the *misfeasance, negligences*, and omissions of duty, on the part of his agent, who is, in his turn, liable to his principal.

truth, of the most innocent and honourable description ; but it gives the candidate notice distinctly, that if bribery should happen to occur by means of one really clothed with the character of agent, however difficult it may be to establish that character, on its being established, the act has vitiated the election. If this rule were to be otherwise, it might be better at once to legalize bribery, because impossible to be detected, or prevented.

It is to be observed, however, that the above expression must be satisfied : the individual whose acts are to affect the sitting member must be *really clothed with the character of agent*. He may be, for a strictly specified purpose, and that only, an agent of the candidate, and capable of attaching to the candidate all liabilities duly flowing from *that* special agency : but for every other purpose he may be, in point of law and of fact, as total a stranger to the candidate as one who never saw or heard of his existence, and did not even know of his election going on.

In the devolution of agency from the original to the ultimate agent as above supposed,—that is, from A. down to Z.,—it must be observed, that an *electioneering privity** (so to speak) must be continued from link to link. The same *kind* of relation, that is, of agency, must exist between Y. and Z., which exists between A. and B., at the commencement of the series ;—or between A. himself and the candidate. It is said, the same *kind* ; not the same *degree*. In other words, it must partake of the nature of general agency, as contra-distinguished to particular :—otherwise this consequence would follow that Z., in the case above supposed, employed *bonâ fide* and exclusively as a bill-sticker for one of the candidates, would be such an “agent” as could, by an illegal act, avoid the election.

There is great force in the observations of Mr. Austin, in his argument on the *Nottingham* case,† and Sir William Follett in the *Hertford* case,‡ in impeaching the authority of *Felton v. Easthope*, which, as reported, certainly imputes loose language to a judge distinguished for his exactness—

* The word *privity* signifies, in law, that *interest* in a contract or estate, or that *relation* to another party, which makes those possessing it cease to be “*strangers*” towards each other : by establishing definite rights and liabilities between them.

† Ante, p. 460, (n.)

‡ P. & K. 551.

Lord Tenterden. According to the note of that case, which speaks of "an agent who may be employed for various purposes, to *canvass*, &c.," [sic], Lord Tenterden would seem to invest a person employed in any subordinate and restricted capacity with a fearful power of committing a candidate, as far as concerns the loss of his election. The proper limitation would seem to be, that such an agent must be entrusted with an authority something like commensurate with the extent of the consequences entailed on the abuse of it: must be charged with or concerned in the management of the election. Beyond that point, it seems preposterous and unjust to carry the liability of a candidate; who would otherwise have no possibility, by any amount of conscientiousness and discretion, in protecting himself against the most extensive acts of illegality. The assumed agent must be shown to stand in such a relation to the ultimate principal, that the latter must have had his attention drawn to the fact, and known, or had the means of knowing, what his agent was doing, or was likely to do.

The case of the bill-sticker may seem an extreme case; but it is of extensive application, and illustrates the principle under consideration. If A. were, as it is called, the head agent of the candidate, no one can doubt that an act of bribery by him would avoid the election: and there would probably be as little difficulty in attaching the same consequences to such an act of any member of the Central Committee. Would the case be altered, in principle, in the case of the chairman and members of a Sub-Committee? or of any local committee? Are they not all, it may be asked, entrusted with *a share* in the general management of the election, and consequently, in a proper sense, the responsible agents of the candidate *for that purpose*; and therefore entrusted with the exercise of that indefinite and unlimited authority which he had delegated to his mediate agent? The question is here reduced to the naked one presented in the ruling of Lord Kenyon, at *Nisi Prius*, reported by Mr. Clifford:* that, in the case before him, "the committee were *collectively, and individually* agents, and that the defendants were answerable for every act done by any of the committee in relation to the election." Upon this it is to be remarked, that the facts of the case do not appear to have

* *Ridder v. Moore and Francis*, Clifford, 371. Mr. Clifford, who was a barrister, says, "I was present at the trial."

ultimately required this ruling: which cannot, therefore, be entitled to the weight of a direct judicial precedent. The action was brought [A.D. 1797] by a publican against two candidates at an election, for Tewkesbury, for "treating and entertaining the voters in the interest of the defendants, on the order of a person named Smith, who had been very active throughout the election. He nominated a committee in their joint-interest; had gone forth to meet the candidates on their arrival, carrying a flag; and headed their procession into the town. He canvassed the town with them; gave directions for bringing voters to the poll; paid some of the bills incurred; was consulted by the committee when any business was done; and was generally understood to be, and treated as, the leading man on the committee. In the language of one of the witnesses, "he was considered a commander there." It also appeared that by orders of some members of the committee there, formed by Smith, a person attended at the hustings, who informed each voter, immediately after he had polled for either of the defendants, what public-houses were open in their interest, and gave him a ticket entitling him to entertainment in the house which he preferred. The other witnesses said that the committees were appointed to regulate the general business of the election; and the examination was pointed to show that many acts were done by individual members of the committee, without either the participation of the other members, or the knowledge of the defendants. It was at this stage of the case that Lord Kenyon made the observation mentioned in the text. Here was abundant evidence to entitle the plaintiff to a verdict, and to justify the jury, under Lord Kenyon's direction, in fixing Smith as the agent, and through him the defendants, as his principals, who had held him forth to the public as his agent, with whom they might deal in that capacity. No committee of the House of Commons, however, would adopt, nor has, it is believed, ever acted upon the *obiter dictum* of Lord Kenyon, so far as to make a candidate liable for every act, of every member, of every one of his committees. The *Cirencester** committee, which sate [A.D. 1803] shortly after the report of this case had appeared, totally repudiated it by their decision. One Webb stated that he had been present at the committee of the sitting member; and being

* 1 Peckwell, 467.

asked of what it consisted, named, *inter alios*, a Mr. Pytt; that three persons were engaged in the business of the election, but that he never saw Mr. Pytt canvass personally for the sitting member. Another witness had sworn that the sitting member had come to the witness's house, accompanied by Mr. Pytt, and asked him for his vote; and that Mr. Pytt had introduced the voter to the sitting member. It was then proposed to give in evidence what *Mr. Pytt* had said, in the absence of the sitting member, respecting the opening of the house of one Matthews; but the evidence was rejected. It is a matter of common knowledge how such 'committees' are practically formed, especially in large constituencies, in either counties or boroughs. Almost any one who chooses may proffer his services, and be enrolled a nominal member of the committee. The candidate may never hear of his name, and were he to do so, would be the first to repudiate his services. An enemy might act the part of a zealous committee man, for the very purpose of ruining the interests he was professing to serve. Such a person is not in law, or in fact, *an agent* entrusted with the authority of the principal, that is the candidate; nor is any act of his the act of such an agent, unless it can be brought home to the knowledge and sanction of those for whose acts the candidate admits his responsibility. The act of such a person would, however, be closely scrutinized by a just committee; they would hear the evidence by which it was sought to show that the person in question was no mere volunteer, but stood in a position which required wilful blindness not to be seen by him *on whose behalf*, or for whose benefit, an act of corruption was committed. It was astutely argued thus in the *Dumfermline* case,* "Generally speaking, the act of bribery itself, committed by a third person, contains most pregnant evidence of *agency*. The offer of a bribe to A., by B., if he will vote for C., affords a strong ground to suspect, that C. is not ignorant that such means are employed to support his cause. What *effect* the proof of such a fact, uncompromised by other evidence of agency, might have upon the minds of the

* 1 Peckwell, 13 [A. D. 1803]. *Nota.*—This case is valuable, because the elaborate arguments *pro* and *contra*, are stated by the reporter to consist of the substance of all the arguments used in similar cases, throughout the volume, condensed and put together, to add to their force, and avoid repetition.

committee, is a different question. It probably would have very little : *valeat quantum*."

Had a candidate but one committee, and that not an extensive one ; and, moreover, were he to be in frequent attendance with them, and seen in personal communication with most if not all the members ; and were one of them to be guilty of bribery or treating, no committee would hesitate to declare him guilty, by his agents, of bribery or treating : even requiring evidence, it might be, to satisfy them that it had not been done with his personal knowledge and consent.

Where each case depends on its particular circumstances, as happens with the great majority of those reported, it is not deemed desirable to cite them in detail : since they are familiar to all engaged in practice before committees, and are correctly and fully reported. Premising that the current of Election Committees' decisions does not run in conformity with the opinion of Lord Kenyon, the following may be regarded as the general result of such decisions, and as constituting—sufficient

Proof of agency—being the acts to be naturally looked for on such occasions, and with such a view.

I.—Being seen, more or less frequently, during the election, in company with the candidate, especially canvassing with him, or without him, and attending, more or less frequently, at his committee rooms.

II.—Being a member, more or less active and prominent, especially if as chairman, of the candidate's committee ; and assisting in conducting the general business of the election—as,

i.—by making arrangements with the returning officer, about the hustings, polling-booths, and otherwise ;

ii.—engaging and paying check-clerks, agents, porters, messengers, door-keepers, &c.

iii.—sending advertisements to the newspapers, drawing up and dispatching addresses, circulars, &c.

iv.—Engaging committee rooms.

v.—Examining bills, &c., &c.

III.—Referring voters, or others concerned or interested in

the election, to the candidate, who sees them without objection.

IV.—Having such person referred to him, by the candidate.

V.—Bills checked and vouched by him, afterwards paid by the candidate, or recognized by him.

It is not said that all these acts must concur, nor that any one singly will suffice, under all circumstances, to establish the agency of a particular individual. A committee will look at all the circumstances of each case brought before them, in order to see whether the candidate ought, in fairness to himself and justice to the constituency and the public, to be regarded as having delegated to a person doing such acts as the above, such an authority as renders the candidate liable for his acts, so far as regards the fate of the election. These are questions of evidence, whether direct or indirect, derived from the acts and conduct of the candidate himself; and acts and conduct of others assuming on his behalf, of which he either has, or may have, and indeed ought to have, personal knowledge. It may be that the maxim may be held applicable to him—*qui non prohibet, cum prohibere possit, consentire videtur*. Knowing his peril, he is bound to be on his guard. Wilful blindness will not, and ought not, to avail.

A few of the more recent cases may illustrate attempts made, both successfully and unsuccessfully, to establish agency. First, successfully.

Great Yarmouth.* [1848.]—One Costerton was “frequently” in the company of the sitting members; and attended them on their canvass. On one of these latter occasions, shortly before the election, he quitted them for a moment, to go to a voter whom he saw at a little distance, and try to persuade him to come over and speak to them. Citing the *Ipswich* case,† it was contended that repeated acts of canvassing established *prima facie* agency:—and so it was held, and Costerton’s statements were admitted in evidence against the sitting members.

Same case.]—An attorney was constantly at the committee

* Printed Minutes, *passim*; P. R. & D. 4, 5.

† K. & O. 343.

room, attending to the business of the election there, and in the afternoon attending meetings of the committee, at which the sitting members were “*frequently*” present. He had also disbursed £200 for the payment of clerks and other persons employed in the election.

Here, also, *prima facie* evidence was held to be established; and the attorney’s declarations were received against the sitting members, who were ultimately unseated, for “bribery, through their agents,” but without evidence of their knowledge or consent.

*Horsham, Second,** [1848].—An attorney was present on behalf of the sitting member, when the polling arrangements were made with the town clerk. He canvassed with the sitting member; once introduced a voter to him; brought up voters to the poll; his clerk had attended at the registration previous to the election (with an avowed agent of the sitting member); was present at an entertainment given to the voters at an inn, when the sitting member attended, and was in the room which had been kept private, by order, for the sitting ‘member’s’ friends, and was seen conversing with him and the landlord. Here, also, a *prima facie* case of evidence was held to have been proved.

Secondly. Unsuccessfully.

Bolton,† [1848.] (1.) One Knight went on the day before the nomination to a voter, who kept a beer shop; promised to pay for a barrel of ale for his vote; giving him two orders for two half barrels, to be supplied, one on that day, and the other on the ensuing day. He received the former on the same day; and after the orders were written, he accompanied Knight to the sitting member’s committee room. (2.) After voting, one Haslam gave him eighteen shillings to buy a quarter of a barrel of ale, and also paid for more drink in his house.—Both Knight and Haslam having been seen in the sitting member’s committee room, this was sought to connect Knight and Haslam with him: but he had never been seen canvassing a voter with either, and being in bad health, did not personally canvass at all.—The committee, unanimously declaring him duly elected, reported that the voter above mentioned had been bribed, but that it had not been proved to have been done

* Printed Minutes, *passim*; P. R. & D. 251.

† Printed Minutes, *passim*; P. R. & D. 52.

by the sitting member, or his agents, or with his knowledge and consent.

*Sligo. Second case,** [1848].—One Stonor had accompanied the sitting member from London to Sligo; had lived with him there, had been seen with his agent, in his committee room; made a speech to the electors, who were in another room of the same hotel; and had been seen walking arm in arm with the sitting member, on his canvass.—This was held insufficient to raise a case of *prima facie* evidence of agency.

North Cheshire,† [1848].—One Braithwait was an active member of the sitting member's committee; and his name was placarded all over the town. It was held that this was not *prima facie* evidence of agency.

In the *London case,‡* [1838], it was proved that one C. had attended meetings of the sitting member's committee; had signed the cards of appointment of clerks; paid the canvassers; signed numerous orders; was a known and recognized manager of the arrangements of the sitting members; the printing was executed by his orders; he paid the secondary a large deposit towards the expenses of the return; and various other acts incidental to, and necessary for, the election, were done under his authority.—“The committee held that the petition,” says Mr. Rogers, in citing the case,§ “had not proved even a *prima facie* case of agency.”

The principle on which this committee proceeded, is not obvious; nor, perhaps, is the precedent one likely to be followed in the present day.

It is, however, proper to bear in mind, in considering many cases of this description, as standing in the Reports, that committees may have been properly influenced by several, or perhaps numerous little circumstances, which may have escaped the reporter, who may not have been always present. Some of the most critical portions of the evidence, as appearing in the report, may have been *disbelieved* by the committee, as having

* Printed Minutes, *passim*; P. R. & D. 212.

† Printed Minutes, *passim*; P. R. & D. 222.

‡ F. & F. 659.—The author, as one of the counsel in the case, can vouch for the correctness of the statement in the text, taken from the Report. The petitioners had got up their case at great expense, and with great labour: but on the decision in the text being announced, they abandoned the case.

§ Law and Pr. of Elect. Comm. 224.

proceeded from witnesses speaking under an evident and strong bias, leading them to exaggerate or invent. The *Chester* case* is one which, if explicable at all, must be so on some of the grounds above suggested. Perhaps, also a similar observation is applicable to the *Shaftesbury*† case, which was opened by an experienced counsel, as "one of the clearest and most complete cases of treating that ever had been presented to a committee." So, on the reported evidence, it seems; yet the committee decided the petition against whom it had been made.

It is to be observed, that in the above, and indeed in every such case, the aim in the first instance is to establish only a *prima facie* case—one weak, or strong, according to circumstances,—but still only a *prima facie*, not a conclusive case: it is open to the sitting member to rebut it by counter evidence; and, one reason why such is sometimes not offered, may be, reluctance to entitle an opponent to the *reply*. It may be deemed expedient, on such account, to run a little risk, choosing what appears, at the moment, the lesser of two evils. These, and the reasons previously assigned, may be usefully borne in mind in weighing the precedent afforded by a former committee.

A Select Committee does not form its conclusions from only this or that apparently cogent item of evidence, or classes of items, but considers all the circumstances of the case,—its whole probabilities, and the general nature of it, as seen by the light of that experienced common sense, which men of the world bring to bear on the ordinary business of life. It sees a person anxious to obtain a seat in the House of Commons; a disproportionably large sum of money expended *by some one* in the interest of that person; it knows that men do not usually expend large sums of their own money to further the political objects of another person; and it by and bye oozes out, that the candidate, who, moreover, must now come himself to answer the questions, did place a large sum of money in the hands of his agent, or some one—a sum far beyond all legitimate expenditure. In addition to this, several, perhaps very many, cases of bribery, and treating *by some one*, are proved. Against such facts is sought to be placed the positive disclaimer, by the candidate, of any intention to sanction illicit practices, and his peremptory injunctions to that effect. He may be justly believed by the com-

* Corbet & Daniel, 68 [A. D. 1819].

† F. & F. 376 [A. D. 1838].

mittee as a man of honour, incapable of speaking otherwise than truly ; and the committee addresses itself to a careful consideration of the whole facts of the case, as finally left for their adjudication ; applying to it, with discretion and firmness, those doctrines of agency which it has been attempted in this chapter to illustrate.

Is there—inquires the committee—direct evidence of agency ?

Does agency result from the relative situations of the parties ?

Is it evidenced by the proved course of procedure ?

May it be inferred from acquiescence, or subsequent ratification ?

Is it more probable that the principal knew, or was in *bond fide* ignorance of, what was going on ?

Are circumstances clearly proved which *must* have awakened him from a false sense of security ?

Are the witnesses, called in support of the charge, trustworthy ?

Are there any who might and ought to have been called to answer it, and who were not ?

When once the requisite species of agency has been established by legitimate evidence, most serious consequences may follow ; for the principal, as we have seen, is at once affected by the acts and *declarations* of those who have thus been proved his agents, and to have done those acts, and made those declarations, while acting within the scope of the authority intrusted to them. Though the authority of such an agent be proved to have extended to legal acts only, the employer will be held responsible for illegal acts of *sub-agents*, acting under the orders of the immediate agent.* Thus in the *Middlesex* election, in the case already adverted to, “the agency of one H., was considered by the committee to be sufficiently proved, by showing that he was the avowed agent [of Mr. Mainwaring] during the course of the election, for *all lawful* purposes.” It was then proved that H., having, “as agent to Mr. Mainwaring, ordered that the directions of one N. should be followed, with respect to treating the voters, *the directions of N.*, given in consequence of this order, were held admissible against Mr. Mainwaring.†

It is otherwise, however, with a *particular* agent, filling a particular situation, or acting under limited instructions. What

* Rogers on Elect. Com. 227.

† 2 Peckwell, 31, 32.

such an one says, beyond the circle of his strictly defined duties, cannot affect his principal, as to whom he is then a mere stranger. Thus in the *Middlesex* case, just cited, it was urged that the sheriffs, being bound to be always at the poll, if they left their under-sheriffs there, were responsible for all that they *said* or did. The committee, however, rejected evidence of what had been *said* by their under-sheriffs, in the absence of the sheriffs.* It was admitted by those, arguing against the reception of such evidence, that “what was **DONE** by the under-sheriff, under the constituted authority of the sheriff, in his absence,—such as, the admission or rejection of votes,—was evidence.”†

Not only will a principal be bound by a ratification of the unauthorised acts of his agent, but, if the latter has improperly substituted *another agent* under him, the ratification by the principal, of the acts of the sub-agent, will, to all intents and purposes, bind him in the same manner as if he had originally given to the agent a power of substitution.‡

It is unnecessary to repeat, what has appeared very fully in the chapters on Bribery and Treating, on the subject of stat. 4 & 5 Vict. c. 57, by which, *in cases of bribery*, and of bribery only, (a single instance of treating a particular voter being, and having being held, *bribery*,) it is not required to prove agency in the first instance, before giving evidence of the facts whereby bribery is to be sustained. It may not be superfluous, however, to reiterate, that this is simply a change *in the order* of adducing evidence, leaving totally unaffected the nature of that evidence itself, as will be more distinctly shown in the ensuing chapter.

In the case of treating, as we have already seen, it is still indispensable to offer sufficient evidence of agency, before proving acts of treating; subject to only one exception, existing in cases where the treating and the agency are inextricably intermingled. Where the agency, and the offence to be proved, are in their nature mixed, not to allow the evidence of these facts themselves, in the first instance, is, in reality, to exclude

* 2 Peckwell, 34.

† In reporting this decision, Mr. Peckwell quotes, in a note, the decision of Sir William Grant, in the case of *Fairlie v. Hastings*, 10 Ves. J. 126, ante, p. 564.

‡ Story on Agency, sect. 249.

that which tends to prove both the agency, and the offence itself, at the same time." This was the observation of a member of the *Midhurst* committee in the year 1804, and quoted as such in the *Middlesex* case, in the same year;* was adopted, "without a division," by the committee, in the *Cambridge* case in 1843;† and has ever since been adhered to. The latest reported case is that of *Aylesbury*, in 1851,‡ which adhered to the ruling of the *Cambridge* committee, on its being cited. In announcing their decision, the chairman thus addressed the counsel:

"The committee feel a difficulty in separating the evidence which relates to *Treating*, from the evidence which may relate to Bribery; and they feel it to be necessary, in a great measure, to defer to the discretion of counsel. Considering the nature of the evidence which has been already adduced, it will be a hazardous thing for the committee to say that they will shut out evidence which may have a fair effect upon bribery. They will, therefore, permit the examination to continue, hoping at the same time that the counsel will keep in mind *the principle of law, which is clearly established, that under the name of bribery, evidence cannot be given of a case of treating, without agency being previously proved.* There is one other consideration which will make the committee anxious not to shut out evidence, namely, that the witnesses who have been hitherto examined have been very unwilling witnesses."

* 2 Peck. 33.

† B. & Arnold, 184, 191 (note E.)

‡ Printed Minutes; P. R. & D. 272.

CHAPTER XXV.

EVIDENCE.

THE law of evidence, both oral and written, has lately been liberated by the legislature from shackles which had for centuries impeded its search after truth. Whoever can competently contrast the present state of the law of evidence with that which existed even so short a time as ten years ago, will have reason to feel great astonishment that those impediments should have been tolerated so long. English law books swarm with rules, and decisions carrying them out with faithful ingenuity, the effect of which is now seen by all to have been only to shut carefully as many apertures as possible, through which that truth might be seen, which courts of justice were instituted to discover. This arose from a marvellous distrust of the conscientiousness of witnesses, and the intelligence of juries, and an inversely strong confidence in the means resorted to by laws, for obviating such evils.

In the year 1798, the law of England concerning the competency of persons to give evidence in a court of justice, stood thus, as testified judicially.

“ I find no rule less comprehensive than this: that all persons are *admissible* witnesses, who have the use of their reason, and such religious belief as to feel the obligation of an oath; who have not been convicted of any infamous *crime*, and are not influenced by *interest*. . . . What *credit* will be due to them will depend on a great variety of circumstances, and must be decided on by the jury.”* Thus there were, *then*, four grounds of incompetency, the existence of any one of which prevented a person from opening his lips in the witness box, or giving evidence by interrogatory, or on affidavit, in any court of justice: but it was the last of these four, which, in the language of a

* *Jordaine v. Lashbrooke*, 7 Term Rep. 610, per Lawrence, J.

celebrated text book on evidence,* “formed the most general cause of incompetency.” It is with a melancholy interest that the lawyer and legislator of 1853 survey the many thousands of now useless decisions which, down to the year 1843, by a refined and consummate logic, carried this great excluding principle into rigorous operation: weighing, as it were, in golden scales, a single grain of INTEREST which might, by possibility only, unduly influence the mind of a witness, and induce him to give biassed and partial evidence; an interest so remote and contingent, as to be visible only, so to speak, as a telescopic star. “The law,” says another eminent text writer, and whose work has by far the most scientific character of any written on the subject,† “excludes *all* who have an actual legal interest in the event, *however minute that interest may be*, because the law must exclude all or none:” and thus, as the same able expositor of the then existing system acknowledged, the law excluded from the witness-box a gentleman of unblemished integrity, and above all suspicion even, who alone on earth knew facts vital to the administration of justice, if it could be made out, by a subtle train of reasoning, that he might have one single farthing’s interest in the ultimate issue; while *admitting* “those influenced and tempted by the strongest ties of natural affection to deceive!”‡ It was in vain that jurists protested against so monstrous an anomaly, urging the propriety of permitting an objection founded on interest to be weighed by the jury, in estimating the value of evidence alleged to be conveyed to them through such a contaminating medium: the principle of exclusion, applicable equally to the alleged incapable witness, and all written or verbal declarations from him, continued in triumphant operation, constituting, as it were, a constant rogue’s carnival, till the year 1833, when the legislature, unable any longer to bear the sight of hourly frustrated justice, ventured timidly one step towards arresting the evil, by enacting, as to actions in common law courts (3 & 4 Will. 4, c. 42, ss. 26, 27), that any interest which the witness might have in the *verdict*, or *judgment*, to the obtaining of which his evidence might ultimately contribute (viz. that that instrument might be used for or against him), should not prevent his being examined; but such verdict

* Phillips on Evidence, vol. i. p. 18 (ed. 1829).

† The late Mr. Starkie on Evidence, vol. i. p. 18 [ed. 1842].

‡ Id. p. 17.

or judgment should not be admissible either for or against him ; and that, in order to facilitate proof of his having given evidence, his name, together with that of the party on whose behalf he appeared, should be indorsed on the record by an officer of the court. The act declared, very modestly, that its object was “to render the rejection of witnesses on the ground of interest *less frequent*.” Ten years’ experience of the working of it encouraged the legislature to assume a bolder attitude in encountering this formidable objection.

In the year 1843 was passed statute 6 & 7 Vict. c. 85.* It recited “that the inquiry after truth in courts of justice is often obstructed by INCAPACITIES created by the present law ; and it is desirable that full information as to the facts in issue, *both in criminal and civil cases*, should be laid before the persons who are appointed to decide upon them, and that such persons should *exercise their judgment on the credit of the witnesses adduced, and on the truth of their testimony*.” The act proceeded to annihilate the latter two sources of incompetency spoken of by Mr. Justice Lawrence, by enacting that no person offered as a witness should be thereafter excluded by reason of *incapacity from crime or interest*, from giving evidence either in person or by deposition, before any court or person so authorised to receive it ; but that every person should be admissible to give evidence, notwithstanding he might or should have *an interest* in the matter in question, or in the event of the trial of any issue, matter, question, or injury” [this must be a misprint for *inquiry*], “and notwithstanding he may have been previously *convicted of any crime or offences*. The act contained, however, a signal proviso, excepting from its salutary provisions THE PARTIES directly and personally interested in legal proceedings,—as instituting, or resisting them, or as parties on whose individual behalf they had been instituted or resisted.

Two years afterwards, viz. in the year 1845, a great number of other heavy hindrances were removed out of the way of administering justice in England, by facilitating the use of official documentary evidence, without formally proving its genuineness. It was enacted† that, wherever *an act of parliament* made any certificate, official or public document, or document, or proceeding

* Called Lord Denman’s Act ; and his lordship is fully entitled to the credit of this most beneficial measure.

† Stat. 8 & 9 Vict. c. 113, post, p. 325, A.

of any corporation, or joint-stock or other company, or any *certified copy* of any document, bye-law, entry in any register or other book, or of *any other proceeding*, receivable in evidence of *any particular*, in any court of justice, or before any legal tribunal, or either House of Parliament, *or any COMMITTEE of either House*, or in any judicial proceeding,—such original or certified copies shall be admitted in evidence, if PURPORTING to be sealed, stamped, or signed, when such is required by statute, without any proof of such seal, stamp, or signature, or of the official character of the signer, and without any further proof; in every case in which the original record could have been received in evidence.

All courts, judges, justices, and other judicial officers and persons acting judicially, are to *take judicial notice of the signature* of any of the equity or common law judges, when appended or attached to any judicial or official document.

All copies of private and local and personal acts of parliament, which are not public acts, if PURPORTING to be printed by the Queen's printers, and all copies of the Journals of either House of Parliament, and of Royal proclamations, PURPORTING to be printed by the printers to the Crown, or of either House of Parliament, shall be admitted as evidence, without any proof of their having been so printed. These excellent provisions are applicable alike to England and Ireland, and the colonies, but excluded from Scotland.* By an act, however, of 1852 (stat. 15 & 16 Vict. c. 27), the provisions of stat. 6 & 7 Vict. c. 85, with reference to witnesses incapacitated by crime or interest, were extended, with certain modifications, to Scotland: where a party individually named in a record or proceeding, is competent, unless shown to be "substantially interested" in it.

Thus far emancipated, the law of evidence worked with such increased celerity and efficiency, that the legislature began gravely to consider whether a step much further in advance, in the same direction, might not be taken with equal safety, and greater advantage, by opening the lips, still sealed, of THE PARTIES themselves, in civil proceedings, however direct or deep might be their interest, leaving *that* matter to be weighed by the jury, in estimating the credibility of such testimony." This last clause, however, was strongly opposed by almost all the judges, who expressed reasonable apprehensions that it

* 8 & 9 Vict. c. 113, s. 5; 14 & 15 Vict. c. 99, ss. 9, 10, 11, 18.

would open the floodgates of perjury. At length, however, the persevering and noble efforts of Lord Brougham were rewarded by his being able to carry through the legislature, in the year 1851, statute 14 & 15 Vict. c. 99,* entitled “An Act to amend the Law of Evidence:” which, by a single section, removing the incapacity of the parties, let in a sudden flood of light upon every question thenceforth made the subject of civil litigation, and operated as a total revolution in the mode of administering civil justice. Those who had for ages stood with sealed lips, while their characters, properties, and liberties were assailed, often by atrocious fraud and falsehood, with perfect impunity; those who alone knew the true facts in dispute, and were yet compelled to look on with indignation, seeing imperfect and illusory efforts being made to prove those facts, were now enabled, in their own persons, to state those facts to the parties having authority to adjudicate upon them. From that moment rampant fraud and chicane received a desperate check. Claims were justly enforced and resisted, which would have been respectively withheld unjustly, or unjustly submitted to: and the interests of truth and justice were prodigiously strengthened and advanced. Within the last few days,† it was announced in the House of Lords, by Lord Campbell, that one of the greatest living ornaments of the English Bench, Mr. Baron Parke, who had originally been strongly opposed to this great measure, had, since it had come into operation, entirely altered his opinion, and considered it one of the most beneficial changes ever effected in the administration of justice.

The statute in question commences by repealing the proviso contained in statute 6 & 7 Vict. c. 85, s. 1,‡ excluding PARTIES from the operation of that act; and then, by s. 2, proceeded to enact as follows:—“On the trial of ANY ISSUE joined, or of ANY MATTER OR QUESTION, or in ANY inquiry arising in any suit, action, *or* OTHER PROCEEDING in ANY court of justice, or before ANY PERSON having *by law*, or by *consent of parties*, authority to hear, receive, and examine evidence of the PARTIES THERETO, and the persons IN WHOSE BEHALF any such suit, action or other proceeding may be brought or defended, shall, *except as hereinafter excepted*, be COMPETENT, and

* Post, p. 359, A.

† February, 1853.

‡ Ante, p. 583.

COMPELLABLE, to give evidence either *vivâ voce*, or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding."

The above EXCEPTIONS were, by the ensuing third, fourth, and fifth sections sixfold :—which declared that the act should not extend, *first*, to render the parties to CRIMINAL proceedings competent or compellable to give evidence for or against each other; *secondly*, nor to compel *any* person to answer *any* question *tending* to criminate himself; *thirdly*, nor to render competent or compellable any husband or wife to give evidence for or against each other;—*fourthly*, nor should it extend to any proceedings in any court, or in parliament, in consequence of adultery; *fifthly*, nor to any action for breach of promise of marriage; nor, *lastly*, to repeal any provision in the Wills' Act.*

It is proposed, in the present session [1853] of parliament, to extend the benefits of this important statute to Scotland; accompanied by considerable modifications of the new law, as applicable to the united kingdom: namely, in respect of the evidence of husbands and wives, and witnesses being compelled to answer questions, though such answers may tend to criminate them.

The last mentioned statute contains other valuable clauses, some of which have been glanced at in a preceding page of this chapter; and of the same class. By the 13th section, in order to "reduce the expense of proving criminal proceedings," the fact of a prisoner having been tried, and either convicted or acquitted, may be established by a certificate or document purporting to be such, under the hand of the proper officer, omitting the formal parts of the record of conviction.

By the 14th section, any public book or document admissible in evidence on its mere production, though no statute

* Stat. 7 W. 4 & 1 Vict. c. 26. See ss. 14—17, as to the attesting witnesses to wills. The following is s. 4, which is here given *in extenso*, as it is not so given in the statute in the Appendix. "Nothing herein contained shall apply to any action, suit, proceeding, or bill, in any court of common law, or in any ecclesiastical court, or in either House of Parliament, being instituted in consequence of ADULTERY, [this, it need hardly be said, includes an action for criminal conversation]; or to any action for breach of promise of marriage."

exist rendering its contents provable by a copy, may be proved by producing a proved copy or extract, purporting to be signed and certified as such by the proper officer.

Such have been, during the last ten years, the rapid strides taken by the legislature, in improving the law of evidence in this country. No one is now excluded from giving testimony in any of our courts, or before any persons having lawful authority to receive it, that can be admitted with safety alike to private or public interests. All who have the use of their reason, and believe in God and a future state; every one, (including even felons convict,) except a child,—so young and ignorant as to be incapable of comprehending the nature, or feeling the obligation, of an oath, a drunkard, an idiot, a madman, or an atheist,—may be examined as a witness; and though occupying the position of a party to legal proceedings, substantially and exclusively interested in them, except defendants in criminal cases, or plaintiffs and defendants in proceedings for adultery, or breach of promise of marriage,—for reasons easily assignable; or, at present, husbands and wives for or against each other—out of regard to the sacredness of the marriage state, and the peace of society. There is, nevertheless, on the statute book, one solitary *apparent* exception to the admissibility of an interested witness; and it relates to the proceedings before a Select Committee for the trial of an election petition. This is owing simply to an oversight on the part of the persons intrusted with drawing up the Election Petitions Act, 1848, and its predecessor, stat. 7 & 8 Vict. c. 103. It is proper to give some explanation of this little *lapsus* of the legislature.

The Grenville Act (10 Geo. 3, c. 16), passed in the year 1770, by s. 18 gave to the Select Committees then called into existence, power to examine witnesses on oath, but without making any allusion to “*interested* witnesses.”

In the year 1813, statute 53 Geo. 3, c. 71, “for amending the trial of election petitions,” by s. 19 enacted thus: “Whereas doubts have arisen as to the authority of such Select Committee to examine as a witness any person who may have *subscribed a petition* to try and determine which such committee shall have been appointed,—be it DECLARED and enacted, that it shall be lawful for such Select Committee to examine *any* person, THOUGH he shall have subscribed such petition, EXCEPT it shall *otherwise* appear to such committee, that such person

shall be an INTERESTED witness." At that time, the law respecting 'interested witnesses' was flourishing in full bloom. They were excluded from a court of justice, as though labouring under a moral leprosy. In the year 1828, the act of 1813 was superseded by stat. 9 Geo. 4, c. 22, and the 39th section of it was retained, with most of its other provisions. By this latter act, the recognizance for a thousand pounds was to be entered into by both "the person or persons, or some of them, subscribing the same, and the sureties." At this time, also, the rule against admitting interested witnesses, continued in active existence: but that having received a great blow in 1833, it experienced a still more decisive one by Lord Denman's Act, in 1843, which removed disability on the ground of interest to give evidence "on the trial of any issue joined, or of any matter in question, or in any inquiry arising in any suit, action or proceeding, civil or criminal, in any court, or before any judge, sheriff, coroner, magistrate, officer, or person [this must be, on ordinary principles of construction,* persons *ejusdem generis*] having, by consent of parties,† authority to hear, receive and examine evidence: but that any person so offered may be admitted to give evidence, notwithstanding he has an *interest in the matter in question, or in the event of the trial, &c.*" The proviso, excludes "any party to any suit, action, or *proceeding*, individually *named in the record* or in whose immediate and individual behalf any ACTION may be brought or defended, either wholly, or in part." It has been already stated that the preamble of this act recites, as the object at which it is aimed, the "obstruction of the inquiry after truth, in courts of justice;" and that it is desirable that full information as to the facts in issue, "both in *civil* and *criminal cases*," should be laid before those who have to decide them. Though Mr. Rogers has said that "it could not be doubted that the language of this act is sufficient to embrace proceed-

* 1 Bla. Com. 89. An *implied* repeal of an act of parliament, is not *favoured* by the law, since such is conceived to carry with it a tacit reproach, that the legislature has ignorantly, and without knowing it, made an act repugnant to, or inconsistent with the other; and the repeal itself is said to cast a reflection on the wisdom of former parliaments. Vin. Abr. Statutes (E. 6), 132, cited, *arguendo*, *Phipson v. Harnett*, 1 C. M. & R. 481; 2 Dwarries, 674; Broom's Maxims, 24, 25.

† e. g. Arbitrators and umpires.

ings before election committees"—it is a matter which may admit of serious question. It would certainly seem as though the legislature did not contemplate, in this act, any proceedings except those in courts of justice, and the administration of civil and criminal law. If this be so, and if a Select Committee appointed to try an election petition cannot be brought within the terms of this remedial statute, then "an interested witness," who had subscribed the petition before them, shown "otherwise" to be such, was incompetent to give evidence before them, as well previously, as subsequently to the passing of that act. Had it applied to proceedings before a Select Committee, it would have overruled the exception contained in the acts of 1813, and 1828. Immediately after Lord Denman's Act, viz. in 1844, was passed stat. 7 & 8 Vict. c. 103; the 77th section of which retained the exclusive clause of the acts of 1813, and 1828, doubtless without attention having been drawn to it; the draftsman mechanically transferring to the new bill, the section contained in the old one; and again, in 1848, which is still more unfortunate, the same clause was inadvertently incorporated, with this faulty ingredient, into the Election Petitions Act, 1848. Even, therefore, had Lord Denman's Act of 1843 applied to committees, it is repealed, *quoad* Select Committees, as far as concerns "an interested witness" subscribing the petition. It is to be observed, however, that by the Election Petitions Act, 1848, the petitioner is not to sign the recognizance; but by s. 3 it is confined to the sureties;* and by s. 2, the only person who can subscribe an election petition, must be a voter, or a candidate, who would be liable to reimburse their sureties, if the latter should be called upon to pay the amount of the recognizance. In the *Dungarvon*† case, a witness who had signed the petition, was objected to; but on its appearing that he had *not* entered into the recognizance, and had consequently no interest in the question of costs, he was held admissible. And again, where the petitioner admitted that he had retained the agent, whose expenses he believed himself liable to pay, and had subscribed to a fund to defray the costs of the petition, but had not entered into the recognizance, he was admitted as a witness.‡ A surety to the recognizance, however, was of

* Ante, p. 292.

† K. & O. 5 [A. D. 1833].

‡ Tralee, F. & F. 331 [A. D. 1838].

course rejected.* The objection in each of these cases (which were previous to the year 1843) was, that the witness was interested in the result of the petition.

Down to the year 1851, therefore, there undoubtedly existed difficulty as to the power of a Select Committee, notwithstanding Lord Denman's Act, to examine a petitioner, otherwise proved to be "an interested witness." In that year, however, passed the statute 14 & 15 Vict. c. 99, which, on a proper construction, appears to dispose of the difficulty in question.

This statute recites simply that "it is expedient to *amend the law of evidence*, in divers particulars," without reference to tribunals of any kind; and having, by the first section repealed the exception as to 'parties' contained in "Lord Denman's Act, proceeds, in the most comprehensive terms, to "amend the laws of evidence"—by applying its provisions to the "trial" of "*any* matter, or question—or *any* inquiry arising in *any* . . . *proceeding* in any court of justice . . . or before *any* person or persons † having by law . . . authority to hear, receive, and examine evidence:" and enacting that in any such issue, matter, question, or inquiry, "the PARTIES THERETO, and the person or persons in whose behalf any such . . . *proceeding* may be bought or defended, shall," except as excepted, "be competent and compellable to give evidence, on behalf of either or any of the parties to the said . . . *proceeding*."

On this it is to be observed, that this is a highly remedial enabling act, and ought to receive a liberal construction. On that principle, and also giving legal effect to the words used in the act, a person *subscribing the petition* is a PARTY to the "proceeding" before the Select Committee. The word party is a *vocabulum artis* in election law, and used in all the election statutes, from the Grenville Act down to the Election Petitions Act, 1848: and stat. 14 & 15 Vict. c. 99, going far beyond the repeal of the exception which in the act of 1843 prevented any "PARTY" to any "proceeding" being admitted to give evidence, affirmatively declares that the "PARTIES TO PROCEEDINGS" shall be competent and compellable to give evidence: thus evincing the intention of the legislature, *negatively*, that parties shall thenceforth not be excluded; and *positively*, that they shall be competent to give evidence. *Leges posteriores priores*

* Ipswich, K. & O. 389 [A. D. 1833-5].

† Stat. 14 & 15 Vict. c. 21, s. 4, post, 43, A.

contrarias priores abrogant. According to both its letter and spirit, the act of 1851 annihilates the previous enactment (admitting it not to have been inadvertent), retaining the exclusion of an “interested witness.” *Omne majus in se continet minus*: who can be more *interested*, than the *parties* themselves? If this be sound reasoning, the clause in the 83rd section of the Election Petitions Act, 1848, relating to interested witnesses, whether electors or candidates, is to be regarded as impliedly repealed by stat. 14 & 15 Vict. c. 99, s. 2; and consequently that the Select Committee may examine one who has subscribed the petition, although it may otherwise appear that he is an interested witness.

If this be a correct interpretation of the statute of 1851, it leads directly to the all important consequence, that petitioners and sitting members, as PARTIES to proceedings before a Select Committee, are both competent and compellable to give evidence before it, touching the merits of the return or election complained of in the election petition referred to it.* In the twelfth Chapter of this work,† it was stated that both unsuccessful candidates and sitting members were, under the statutes in question, compellable to give evidence on oath before the Select Committee; and the opinion there expressed, has been subsequently, and previously to the opening of the present parliament, confirmed by very high judicial authority consulted‡ on the subject. It is needless, however, to assign the additional reasons which had been prepared to fortify that conclusion; as the Select Committees of the present session [1852—53] have acted in conformity with this view of the statute, and both petitioners and sitting members have been subjected to free and rigorous examination, followed by the most decisive results.

It may be asked, however, to what extent are the *parties* thus compellable to answer? By the third section of the act under consideration, it is enacted, immediately after the section rendering the parties admissible and compellable witnesses, that “nothing therein contained shall render any person who, *in any criminal proceeding* is CHARGED with the commission of any indictable offence, or any offence punishable on summary conviction, COMPELLABLE to answer any question TENDING TO

* Stat. 11 & 12 Vict. c. 98, s. 76.

† Ante, p. 240, *et seq.*

‡ By the author.

CRIMINATE HIMSELF OR HERSELF." This clause manifestly does not apply to PARTIES examined before a Select Committee; who are no criminal tribunal, and sworn to try only the merits of the return or election, and to determine who, if any one, was duly returned or elected, or whether the election was void; or whether a new writ should issue. Under statute 4 & 5 Vict. c. 57, however, they are bound to report to the House whether bribery was committed, and with the knowledge and consent of the sitting member. If it were, he is liable to an indictment, to an information, and to actions for penalties: and the question then arises, whether, independently of the statute 14 & 15 Vict. c. 99, a party, thus compellable to become a witness, is also compellable to answer any question tending to criminate himself?

Under stat. 5 & 6 Vict. c. 102, s. 1, the Select Committee is empowered "*in their discretion*," to examine into the cause of proceedings before them being withdrawn,* abandoned, and re-opened, and to call before them and examine for that purpose, "the sitting member and candidate, and their agents, and all other persons,"—but it is expressly enacted, only, "as WITNESSES, SUBJECT to the" [THEN] "ORDINARY RULES OF EVIDENCE."† In the event of the Select Committee being reassembled under that act, they could exercise only (s. 2) the power and authorities relative to the examination of members of parliament, candidates, agents and others, which were possessed and exercisable by it previously. By the 4th section, on a petition complaining of general and extensive bribery at the three last or any previous elections, the committee is to proceed according to the act *then* (A.D. 1842) in force, "and all powers, clauses, and provisions in the stat. 4 & 5 Vict. c. 53, or any other act for the time being in force for regulating the *trial* of controverted elections," are to be taken to apply to such committee and its proceedings; which are thus to be in conformity with the provisions of the Elections Petitions Act, 1848. And in the event of commissioners being appointed under stat. 15 & 16 Vict. c. 57, to inquire into corrupt practices in elections, great as are the powers intrusted to them, they are yet, by s. 6,‡ expressly limited, in their inquiries, to "all such **LAWFUL MEANS** as to them appear best."

* Ante, p. 487, *et seq.*

† Post, 268, A.

‡ Post, p. 362, A. c.

Now, according to the law of England, though a man be *competent* to prove his own crime,* to adopt the language of Lord Eldon, “the proposition is clear, that no man can be compelled to answer what has any tendency to criminate himself.”† There is a cloud of authorities to support that proposition, as laid down by this transcendent lawyer, — and which is recognized in the United States, as well as in this country, — that if the fact to which the witness is interrogated, form but a SINGLE REMOTE LINK in the chain of testimony, which may implicate him in a crime or misdemeanor, or expose him to a penalty, or forfeiture, he is not bound to answer,‡ “*nam nemo tenetur seipsum prodere.*” Now, bribery is a misdemeanor at both common and statute law, entailing on both parties to it, fine and imprisonment, the forfeiture of the franchise, and pecuniary penalties; and no witness, consequently, is bound to answer any question tending to implicate himself in such a misdemeanor. Whether the answer may tend to criminate himself, or expose him to a penalty, or forfeiture, is a matter not left absolutely to the witness, *but to the court*, to determine, under all the circumstances of the case, as soon as the witness claims its protection. The court will not require him fully to explain *how* the apprehended effect might be produced, which would be simply compelling him to give the very evidence which he is entitled to withhold. It appears to be still an undecided point, whether the *mere declaration* of a witness, on oath, that he believes the desired answer would tend to criminate him, will suffice to protect him from answering, where *the other* circumstances of the case *are not such as* to induce the judge to believe that the answer would, in reality, tend to criminate the witness, or have that effect.§ The full operation of this protective rule, would be undoubtedly to restrict within narrow limits the disclosures which it is expedient for the public interests that Select Committees should have power to compel. Perhaps, therefore, it might be wise of the legislature to interpose, for the purpose of removing this obstruction to the inves-

* Per Alderson, B., *Udall v. Walton*, 14 M. & W. 256. He adds, — “though not *compellable*.”

† Exp. Symes, 11 Ves. 525.

‡ Taylor’s Law of Evidence, sect. 1069, and the numerous authorities there cited.

§ *Rex v. Garbett*, 2 C. & K. 495; 1 Dennison’s C. C. 258; and see Taylor’s Evidence, sect. 1071.

tigation of truth, by equitable provisions requiring the answer to be given ; and if given *fully* and *truly*, and to the satisfaction of the committee, empowering the chairman to give the witness a certificate of indemnity from all penal consequences whatsoever ;* as was done in the year 1842, by statute 5 & 6 Vict. c. 102, and is enacted by stat. 15 & 16 Vict. c. 57, ss. 9, 10, in the case of witnesses before the commissioners appointed under that act to inquire into corrupt practices. By the latter part of s. 9, it is provided, that, since the witness may be thus thoroughly indemnified in making full and true disclosure, “no person shall be excused from answering any question put to him by such commissioners, on the ground of any privilege, *or on the ground that the answer to such question will tend to criminate such person.*”†

Under the existing law, therefore, no witness is bound to answer any question, if, in the opinion of the judge, the witness has reasonably alleged that such answer would tend to criminate himself. Nor is he bound to produce any documents‡ which would have that tendency (a rule enforced alike in courts of law and equity) unless they be of a *public* nature, or such as are directed by statute to be kept and produced.§

This privilege, or rather right, rests on principles of policy and humanity,—of policy, because it would place the witness under the strongest temptations to perjure himself ; of humanity, because it would be to extort a confession of truth by placing him, as it were, on the rack ; which is abhorrent to English law. It is to be observed, however, that this privilege belongs to, and must be claimed by, the witness himself alone. He may claim his protection at whatever stage of the questioning it may occur to himself to do so, and so avoid any further self-crimination. This right has recently [A.D. 1847] been vindicated by a majority of the fifteen judges, in the case of *R. v. Garbett*, overruling previous judgments of Lord Tenterden and Lord Wynford, and confirming one of Lord Eldon.|| Counsel ought not to be permitted to make the objection for the witness, nor is

* Ante, p. 492.

† Post, p. 362, A. C. It is superfluous to say that an indictment for perjury would be excepted from any such indemnity, as might afterwards prove to have been obtained in respect of false evidence.

‡ *Whittaker v. Izod*, 2 Taunt. 115 ; *Rex v. Dixon*, 3 Burr. 1687 ; *Parkhurst v. Louton*, 1 Mer. 400.

§ *Bradshaw v. Murphy*, 7 C. & P. 612.

|| 2 Carr. & K. 474.

the judge *bound* to warn him of his danger, though he frequently thinks it fair and humane to apprise a witness of his rights, who may not be aware of them.—Before quitting this important branch of the subject, it is proper to advert to the much, long vexed, and still unsettled question, whether a witness can be compelled to answer a question, when the answer, though it may not tend to expose him to punishment, yet tends to “degrade” or “disgrace” him. Much consideration of the reported conflicting cases on the subject, and reflection on the principle and policy applicable to the case, may perhaps lead to the conclusion, that of two evils the lesser is to be selected; that though it may be hard to hurt the feelings and lower the character of one compelled to give evidence, by requiring answers to seriously derogatory questions; on the other hand, it is monstrous that another man’s character, liberty, property, or life, should be at the mercy of a witness whom he knows to be worthless, but who stands decked out before the jury in false colours of honesty and respectability. *The QUESTION, however, may clearly be put*; and a refusal to answer it, instead of a witness being indignantly eager to do so, is quite sufficient for the jury to draw their own conclusions as to the weight due to his evidence. The members of a Select Committee of the House of Commons may well be left to exercise their discretion on such an occasion. In the *Sudbury** case, the committee intimated to counsel, that they would use their own discretion as to cautioning witnesses on this ground.

Thus much for the **PARTIES** to a petition, in the character of either electors, or unsuccessful candidates, or the sitting member petitioned against. All are now both competent and compellable to give evidence before the Select Committee, subject to the rules of evidence which have been discussed in the foregoing pages.

The next question concerning the competency of persons to be heard as witnesses before a Select Committee relates to **VOTERS**.

Election law books are filled with discussions before committees, as to the right of voters to appear in favour of, or against, their own votes; but such questions may be now regarded as set at rest.

If they be *not* “**PARTIES**,” then no law disables them from

* Barr. & Aust. 250 [A. D. 1842].

giving evidence: if they be "PARTIES," then, by statute 14 & 15 Victoria, c. 99, they are both competent and compellable, and the directness or amount of "interest" which they may have, is nothing.

The 52nd section of the Reform Act, indeed, enabled an elector to substantiate his vote, on oath, in the court of the revising barrister; and the 41st section of statute 6 Vict. c. 18, as expressly empowers the barrister "to administer an oath to all persons examined before him; and all parties, whether *claiming, objecting, or objected to*, may be examined on oath, touching the matters in question." If a select committee be duly called upon to review the revising barrister's decision, they can examine the voter whom he had examined, and even one who did not himself appear before the revising barrister. In point of fact, a scrutiny is, as it has been regarded almost uniformly by committees, as to each vote, *a cause*, in which the supporter of the vote, and the voter, are the "parties" on the one side, and the opposers of the vote are the "parties" on the other.* On this principle it was, that the voter's own testimony was held inadmissible in support of his vote, while it was and is evidence *against* it, as an admission against his interest.†

Thus, then, a voter, or one claiming to have had a right to vote, and exercising that right at the election, as far as tendering his vote was concerned, is competent to prove everything relating to the validity of his vote, and the fact of his having tendered it, and to disprove any subsequent loss of qualification, incapacity, or other ground for impeaching his right to the franchise, and his valid exercise of that right.

Election committees of the present day, therefore, while their jurisdiction is distinctly defined, and in some directions restricted, but in others enlarged, are relieved from a great multitude of questions with which their predecessors were harassed, as to the competency of witnesses, and the admissibility of testimony. While the objections to competency of witnesses are so restricted as they now are, those relating to the admissibility and the effect of evidence remain, as they must needs be, numerous and sometimes very difficult. Before going into some matters of detail, it may be useful to explain briefly one or two of those

* Taylor on Evidence, sect. 536.

† Wardle's case, *Wigan*, Bar. & Aust. 139; Rogers on Election Committees, 91, note (a).

leading rules and principles of evidence, which are called the most frequently into exercise, and apt to be suddenly questioned, as to their application to the facts under investigation. The rules which follow are here laid before the reader, because the utility of doing so seemed abundantly evident from the numberless instances to be found in the Reports of decisions of Election Committees, of arguments founded on these principles.—

I. There is this cardinal distinction between a Jury and a Select Committee. The former is sworn “well and truly to try the issue joined between the parties and a true VERDICT give, according to the evidence.” That is, they are to state, upon oath, the result of the facts in evidence: and the court then *adjudges*, according to the law arising on the facts so found. A Select Committee of the House of Commons, however, unites in itself these double functions:—it applies the law, as well as finds the facts.* Its members are sworn “well and truly to try the matter of the petitions referred to them, and a true JUDGMENT to give, *according to the evidence*”:† That is, they are to ascertain the facts by legal evidence only; and then adjudge what is the law arising on them. Whether there be ANY evidence, is a question for themselves to decide, in their judicial capacity; whether it be SUFFICIENT, in their capacity as jurymen.‡ In this latter capacity, they are to be vigilant in observing PROBABILITIES, INFERENCES, and PRESUMPTIONS, from proved circumstances, often of powerful and irresistible cogency, and yet often missed by those not practised in detecting their existence. The *absence of proof*, which might have been brought forward, often really outways, in real significance, an entire heap of circumstances and testimony, most peremptory and positive in its tenor, ostensibly adduced in order to disguise the absence of that proof.

Note.—There is one presumption of much practical value.

Where the existence of a particular subject-matter, or relation, has once been proved, its CONTINUANCE IS PRESUMED, till proof be given to the contrary; or till a DIFFERENT presumption be afforded by the very nature of the subject-matter. Thus, where a pauper is once proved to be settled in a parish,

* Ante, p. 283; stat. 11 & 12 Vict. c. 98, s. 68, post, 343, A.

† Clifford, 373, note (b).

‡ *Company of Carpenters v. Hayward*, Doug. 375; B. N. P. 297.

he is presumed to *continue settled* there:* and so of the appointment of a person to an official situation,—of his continuance in it, at all events, for a reasonable time. So of a partnership, tenancy, hiring and service; and of the continuance of human life. In the language of Mr. Baron Bayley,—“Things must be presumed to remain in the same state in which they are proved to have once been, unless there be some evidence of a subsequent alteration.”†

These and other considerations may serve to show the serious importance of a Select Committee being well acquainted with the leading doctrines on which the law of evidence is founded:—for if they come to an erroneous but irreversible decision, it must be because they have admitted improper or rejected proper evidence; or drawn the wrong conclusion from that admitted.

There is no difference between the rules of evidence at law and in equity—in civil and criminal cases. ‘Whatever,’ said Lord Tenterden, ‘may be received in the one case, may be received in the other; and what is rejected in the one, ought to be rejected in the other:‡ a FACT must be established by the same rules of evidence, whether it be followed by a civil, or a criminal consequence.§

II. The Select Committee will require **THE BEST EVIDENCE OF WHICH** the **NATURE OF THE PARTICULAR CASE** before them is **SUSCEPTIBLE**. This is a great and salutary rule, never to be lost sight of by a tribunal competent to discern between genuine and spurious evidence. The rule is based upon a suspicion of fraud.|| If it appear, from the very nature of the transaction, that **OTHER AND BETTER** evidence of the fact is withheld, a presumption arises, that the party attempting to foist inferior evidence upon the tribunal examining into the matter, has some secret and sinister motive, for not producing the best and most satisfactory; and is conscious that if such were

* See per Lord Ellenborough, *Doe v. Pulerm*, 16 East, 55; *R. v. Tanner*, 1 Esp. 306.

† *Doe v. Deakin*, 3 C. & P. 402. Very recently, a judge suddenly and satisfactorily disposed of a case somewhat complicated in its facts and troublesome to deal with, by the application of the principle in the text.

‡ *Rex v. Watson*, 2 Stark. Rep. 155.

§ Lord Melbourne’s case, 29 Howell, St. Tr. 763.

|| Starkie on Evidence, vol. i. p. 642, Ed. 1853.

to be afforded, his object would be frustrated. This is a rule absolutely essential to the pure administration of justice ; and one, the observance of which should ever be watched with the utmost jealousy.—If an original instrument cannot be produced, it is for the committee to judge whether there have been adduced sufficient evidence to satisfy it that a *bond fide* diligent search was made for the instrument, *where it was likely to be found*. If its production be, on legal grounds, impossible, the effect is the same as though it had been lost, or destroyed, as far as relates to the secondary evidence of its contents, which is then, and then only, admissible. Having shown the instrument to have been once in existence, as a genuine one—and stamped, where necessary—evidence of its contents may be given. But here it is to be observed, that it is not necessary to give the *next best* evidence of it, as was once supposed. It is now settled, that though a counterpart, or a copy should be in existence, or other better secondary evidence than parol, still parol evidence is admissible : for it is said, that there are *no degrees* in secondary evidence.*

III. HEARSAY is second-hand evidence, not receivable in judicial investigations. This has been a fundamental principle of the law of evidence, ever since the time of Charles II. :† and so strict is the rule of exclusion, that it is adhered to where, if the declaration be rejected, *no other evidence* can possibly be obtained : as, for example, if it purport to be the declaration of the only eye-witness of the transaction, and he be since dead.‡ It is of great importance to be aware of the exact nature of hearsay, and why it is rejected. In its legal sense, *hearsay* denotes that kind of evidence which does not derive its value solely from the credit given to *the witness himself* ; but rests also, in part, on the veracity and competency of some other person. That this spurious species of evidence is not given upon oath ; that it cannot be tested by cross-examination ; and that it supposes the existence of some better testimony which might be adduced in the particular case,—are not *the sole grounds*,

* *Doe v. Wainwright*, 5 Ad. & E. 520 ; and cases cited in 1 Stark. 544 (note c), ed. 1833.

† One of the earliest recorded cases in which the rule was acted upon was *Sampson v. Yardley*, 2 Keble. 223. [19 Charles II.]

‡ Taylor on Evidence, sect. 384 ; 1 Phil. Ev. 209. The rule is otherwise, in this particular case, in Scotland.

weighty though they be, for its exclusion. Its tendency to protract legal investigation to an embarrassing and dangerous length,—its intrinsic weakness,—its incompetency to satisfy the mind as to the existence of the fact,—and the frauds which may be practised with impunity under its cover, combine to support the rule which **REJECTS HEARSAY**.*

It is however necessary to distinguish between that which is, as mere hearsay, inadmissible, and that which is receivable as clothed with another character,—that of being *so linked with an ACT which it accompanies, as to be identified with the act itself*,—where that act itself is material and admissible,† and the nature and quality of the act are also material. An act and declaration then melt into one fact. The usual example adduced in illustration of this doctrine, is that of *a declaration* made by a trader, at the time of deserting his home or place of business, as to his **INTENTION** and **OBJECT IN SO DOING**, when the object of those adducing such evidence is to prove an act of bankruptcy. Here it is observable, that the *fact* of departure is material. The question is, as to the nature and quality of the act; that is, as to the *object* and *intention* of the trader, in doing that act; and to prove this, the declaration which he made at the time of leaving his home or counting-house, are properly admitted in proof of his design, as being natural and spontaneous indications of the truth: although his **SUBSEQUENT** declaration, *even upon oath*, would be absolutely rejected.‡ This case perfectly illustrates the nature and value of the rule in question.

Note.—Some of the declarations admissible on the foregoing principle, have been considered in the preceding chapter on Agency.§

IV. THE EXAMINATION OF WITNESSES.

A committee is often required to decide as to the propriety or impropriety of the course adopted by counsel in examining and cross-examining witnesses. On an **EXAMINATION IN CHIEF**, or direct examination, the principal point to be observed is, the avoidance of leading questions, as they are called; that is,

* Taylor on Evidence, ss. 384, 385.

† *Reg. v. Bliss*, 7 Ad. & Ell. 361.

‡ 1 Stark. 33, 34. The principle of admitting declarations as accompanying acts was much considered in the case of *Doe d. Eatham v. Wright*, 7 Ad. & Ell. 313.

§ Ante, p. 563, *et seq.*

questions by a friendly examiner, so framed as to suggest to the witness the desired answer: or which,—embodying a material fact,—admit of a conclusive answer, by a simple negative or affirmative.* All such questions are inadmissible and objectionable, and, if allowed, would seriously impair the integrity of evidence. The object of the examiner should be, as far as possible, to let the witness give his own genuine statement of facts, only guiding him, where necessary, towards those which are relevant. Even with regard, however, to material points, the most experienced judges will allow leading questions to be put, on an examination in chief, where the witness, by his conduct in the box, discloses palpable hostility to the party producing him, or reluctance to give evidence. This is a matter purely of judicial discretion. Lord Abinger, Lord Wynford, Mr. Justice Coleridge, and Baron Alderson, allowed this course to be taken in the cases cited below;† and there are numerous other instances on record. An *evident* want of recollection, also, may be aided by a suggestion.

The most frequent disputes, however, arise concerning the nature and extent of the right which a witness has to refresh his memory, by reference to a written instrument, memorandum, or entry. The condition of this being allowed, however, is—that the writing was made, or its accuracy recognized, at the time of the fact occurring, to which it relates, or so soon afterwards as to render it probable that the memory of the witness was fresh when the entry was made. These are questions of discretion depending on the circumstances of each case.—It is exceedingly doubtful whether a witness ought to be allowed to look at a mere *copy* of his original memorandum.‡

The *memoranda* by which a witness may refresh his memory, should also have been made by either himself, or some one in his presence,§ or *at least* he should have examined them while the facts were fresh in his memory; and should *then* have known that the particulars mentioned in them were correct.

* *Nicholls v. Dowding*, 1 Stark. 81, per Lord Ellenborough.

† *R. v. Chapman*, 8 C. & P. 559; *R. v. Bale*, id. 745; *R. v. Murphy*, id. 306—308; *Clark v. Suffery*, Ry. & Moo. 126; *Parkin v. Moon*, 7 C. & P. 409.

‡ Taylor on Evidence, sect. 1031. See *Beech v. Jones*, 5 C. B. 696.

§ *Duchess of Kingston's case*, 20 Howell, S. T. 619; Taylor, sect. 1032.

It is often supposed to be necessary, that a witness should be able, after having thus refreshed his memory, to say that he then has a recollection of the facts, independently of the memorandum. This, however, is certainly not so. It will suffice if he recollect having seen the paper before, and that when he *then* saw it, he knew its contents to be correct. Nay, further:—though he have entirely forgotten both the facts themselves, and his having ever seen the paper, if, on recognising his writing or signature, he can vouch for the accuracy of the memorandum, and *will swear* to the particular fact in question, it will suffice.*

When a document is used for these purposes, it is usual and reasonable (and *necessary*, where the witness has no independent recollection of the fact) that the opposite counsel should have an *opportunity of inspecting* them; in order that when *he* examines, he may have the benefit of the witness refreshing his memory on every part. Nor is such counsel bound to make the document his evidence, merely because he has looked at it, or examined the witness as to such entries *as had been* previously *referred to*. If, however, he go further—and ask a question as to *other* parts of the document, then he makes it his own evidence.†

If a paper be put into the hand of a witness merely to *prove handwriting*,—or if, though it was shown the witness to refresh his memory, it wholly failed to do so, the opposite party is *not* entitled to see it.‡

A grave question exists whether, when a witness called by a party to prove a fact, gives testimony contrary to what had been expected from him, the party so taken by surprise may prove that *the witness has previously stated the facts differently*? The most eminent judicial names, both of deceased and living judges, are ranged on each side of this question; and the matter will be found fully and ably discussed by Mr. Taylor (§ 1049). In the recent case [A.D. 1850] of *Melhuish v. Collier*,§ it was decided that although the general rule is, that on the trial of a cause, a party shall not discredit his own witness, yet, if he unexpectedly give adverse evidence, the counsel may ask

* *R. v. St. Martin's, Leicester*, 2 A. & E. 210; *Maugham v. Hubbard*, 8 B. & C. 14; Taylor, sect. 1034; Starkie, i. 179.

† See the cases collected in Taylor, sect. 1335.

‡ *Russell v. Rider*, 6 C. & P. 416; *Sinclair v. Stevenson*, 1 C. & P. 583; *R. v. Duncombe*, 8 C. & P. 369.

§ 15 Q. B. 878.

him if he have not, on a particular occasion, made a contrary statement ; and both question and answer may be stated by the judge to the jury, with the rest of the evidence ; the judge cautioning them not to infer, merely from the question, that the fact suggested by it is true.*

If a witness called in support of a case, unexpectedly give evidence in opposition to it, the party calling him may go on to prove the case by other witnesses ; and it will be no objection to the proof of any relevant fact, that the statement of it contradicts, and thereby indirectly discredits, the first witness. The fact is relevant, though it be not part of the transactions on which the issue turns, if the truth or falsehood of it may fairly influence the belief of the jury as to the whole case. Thus, if the plaintiff's first witness deny a material fact, and state that persons connected with the plaintiff have offered him money to assert it, the plaintiff may call those persons, not only to prove the fact denied, but to disprove the attempt at subornation.

CROSS-EXAMINATION. — The free but not licentious exercise of cross-examination, is one of the most precious safeguards of truth, by detecting and defeating artful deceit and falsehood, or negatively demonstrating unassailable truth. A right so important is naturally often the subject of constant contest. It is clear, that if a witness enter the witness-box in obedience to a subpoena *duces tecum*, *merely to produce a document*, which either requires no proof, or will be identified by another witness, he need not be sworn ;—and if not sworn, cannot be examined. It not unfrequently happens, however, that a witness is needlessly and inadvertently sworn ;—when the general rule is, that if the error be discovered before the examination in chief has been, at all events, *substantially* commenced, no cross-examination will be allowed. This was expressly ruled, by Coleridge, J., after argument by Mr. J. Wightman and Cresswell, J., then at the bar, on the Northern Circuit, in 1840. Mr. Cresswell, for the plaintiffs, called a witness, who was sworn in the usual course ; but before *any* question had been put, Mr. Cresswell said, “ I have been misinstructed as to what the witness was able to prove, and shall not examine him at all.” The witness was hereupon retiring, when Mr. Alexander claimed the right to cross-examine

* This case does not determine whether the party may contradict the witness *by evidence* as to such former statement.

him. The point was fully argued, and Mr. Justice Coleridge ruled that there was no such right. After laying down the rule as above, he said, "If, indeed, the witness had been able to give evidence of the transaction which he had been called to prove, but his counsel calling him, had discovered that besides *that* transaction, he knew other matter inconvenient to be disclosed, and therefore attempted to withdraw him, that would be a different case."* This may be regarded as the rule now recognised in courts of law. If, however, a competent witness be intentionally called and sworn, though not asked a single question, he is liable to be cross-examined by the other side.†—Leading questions may be asked, on cross-examination, but not unlimitedly. They must not assume facts to have been proved, or particular answers to have been given, contrary to the fact.‡ Nor can a witness be cross-examined as to the contents of a written document not produced, nor as to the contents of one in the hands of the adversary, which he has had notice to produce, for that is part of *the case of the cross-examining party*, which cannot be gone into, until that of his adversary has been concluded.§

A cross-examination is not, in this country, limited, as has been recently and solemnly decided by the supreme court in America, to the facts disclosed in the examination in chief, but extends to the whole case: whereby one single witness may serve for both parties—to establish and to demolish the case which he had been called to prove. This right, existing in England and Ireland by the common law, was extended to Scotland by stat. 3 & 4 Vict. c. 59, s. 4.

In the *Yarmouth* case,|| a witness being cross-examined for the purpose of impeaching his credit, was asked as to divers acts of his own at the election. This was objected to, as recriminatory evidence, not admissible in that inquiry, as the petitioner did not claim the seat. The committee, after deliberation, announced the following Resolution:—"That counsel confine his cross-examination *to the facts stated by the witness in his examination in chief*, and to matters affecting personally the

* *Wood v. Machinson*, 2 Mood. & Rob. p. 273.

† *R. v. Brooke*, 2 Stark. Rep. 472, per Lord Tenterden.

‡ *Hill v. Coombe*; *Hanndley v. Ward*, coram Lord Tenterden, 1 Stark. 197.

§ 1 Stark. 197, 198.

|| Print. Min. p. 9.

credibility of the witness.” The expressions in italics are not to be understood as indicating a contravention of the rule laid down in the text, but only a restraint upon efforts to use the power of cross-examination, in order to elicit facts irrelevant and inadmissible on the inquiry before the committee. While the examination in chief is properly restricted to the points in issue, to the exclusion of collateral facts incapable of affording any reasonable presumption as to the *principal* matters in dispute, a greater latitude is allowed in cross-examination, when the judge sees it fitting, on account, for instance, of the conduct and temper of the witness, or other circumstances; or where cross-examining counsel will responsibly pledge himself to show, in a subsequent stage of the cause, the relevancy of the question.* If he fail to do so, he deserves grave reprehension, for he has not shown himself entitled to the judicial confidence which had been reposed in him.

Finally. It is to be observed that no question can be legally put to a witness, on cross-examination, respecting any *collateral irrelevant* fact, for the *mere purpose of contradicting* him, if he should give a particular answer, by other evidence, in order to discredit his testimony. This rule has been recently confirmed, expressly, on appeal, by the House of Lords.†

The mode of dealing with witnesses on examination, or cross-examination, is in fact greatly in the discretion of the court; who will allow counsel, *if necessary*, to cross-examine even his own witness.

The credit of a witness may be impeached by disproving *material relevant* facts sworn to by him; by impugning his character for veracity, by evidence of his *general* bad reputation among his neighbours; what that reputation is, and whether, from such knowledge, the witness would believe the other on his oath.

He may also be shown to have made statements out of court contrary to what he has testified in it; but he should first be asked as to the *time, place, and person* involved in the alleged contradiction.

Where any of these means of impeaching the character of a witness have been resorted to, or his general character for

* *Haigh v. Belcher*, 7 C. & P. 389, Coleridge, J.

† *Tennant v. Hamilton*, 7 Clark & Finelly, 122.

truth has been so put in issue, general evidence may be adduced of his being a man of integrity and veracity.

The evidence of a single witness, where there is no sufficient reason for doubting his integrity or knowledge, is a sufficient legal ground for belief; that it is strong enough to produce actual belief, every man's experience will vouch.* With certain important exceptions, this rule applies alike to civil and criminal cases; but undoubtedly, those who have to decide on the weight and value of a solitary unsupported witness, especially in a case of mere personal implication, will act with extreme caution. Thus, in the *Lyme Regis* case † [A. D. 1848], a single witness deposed to two or three cases of alleged personal bribery by the sitting member, who was tendered by counsel to contradict the witness. The committee necessarily rejected him, as being a *party*, and therefore *then* inadmissible; —but the chairman stated, that “seeing that the evidence rested on the statements of one person only, and that the sitting member could not be permitted to give his testimony in contradiction, will consider those cases which rest on single and unsupported evidence, *with many grains of allowance.*” If, indeed, committees were to act in a different spirit, no candidate at an election would be safe. It need hardly be added, that this case occurred three years before the passing of the act 14 & 15 Vict. c. 99, which would have enabled the sitting member to be examined.

In the CHELTENHAM committee‡ [1848,] the chairman intimated to counsel, that as a single witness had given very material evidence diametrically in opposition to that of three or four previous witnesses, the committee wished to know whether the counsel for the sitting member ‘was prepared to corroborate such evidence of the single witness?’ It was not *necessary* for the committee to ask this question, because the matter was one for themselves to deal with, in the end, in their capacity of jurymen, estimating the weight, amount, and value of the evidence which had been adduced; and if they saw that on one side there had been only a single trustworthy witness, and on the other three as trustworthy—there would be little difficulty in seeing to which side the scale should incline; for one

* 1 Stark. 827.

† Printed Min. 257.

‡ Print. Min. pp. 191, 202.

may be more likely to be mistaken than three. Yet one may be far more satisfactory than three. The valuable maxim of the law is, *PONDERANTUR testes, non NUMERANTUR*. No definite degrees of probability can, in practice, be assigned to the testimonies of witnesses; their credibility usually depends upon the special circumstances attending each particular case; upon their connection with the parties, and the subject matter of litigation; their previous characters, the manner of delivering their evidence, and many other circumstances, by a careful consideration of which the value of their testimony is usually so well ascertained, as to leave no room for mere numerical comparison.* The evidence of one witness may exactly fit all the *probabilities*; and that of three, or any number, or *vice versâ*, dislocate all the probabilities.

The relative consistency of testimony is a most important test of comparison. The testimonies of witnesses of truth, will *consist* with each other, and with all the established circumstances of the case, in numerous and minute particulars, which are frequently beyond the reach of invention; and will exhibit that degree of solid coherency which necessarily results from a real and actual connection and congruity in nature, which minuteness and detail of circumstances will serve but to render more complete. With false witnesses, however, the very reverse takes place; their testimony must either be sparing in circumstances, and therefore of a nature obviously suspicious, or be liable to detection, from comparing the invented circumstances with each other, and with those which are known to be true.” †

A thorough practical master ‡ of the principles of evidence thus sums up the essentials of valid circumstantial proof.

First—The *circumstances* from which the conclusion is drawn, must be *fully established*.

Secondly—*All the facts* should be consistent with the hypothesis. *If any one established fact be wholly irreconcilable with the hypothesis, the latter cannot be true.*

Thirdly—The circumstances must be of a conclusive nature and tendency.

If, assuming all to be proved, which the evidence tends, and

* Stark. Evid. p. 882, 4th edit. 1853.

† Ib. 872.

‡ Mr. Starkie, vol. i., pp. 856, et seq.

is offered, to prove, *some other hypothesis* may yet be true; the circumstantial evidence is always insufficient.*

Fourthly—The circumstances should, to a moral certainty, actually exclude every hypothesis but the one proposed to be proved.

Lastly—Mere circumstantial evidence ought *in no case* to be relied on, where direct and positive evidence, which might have been given, is wilfully withheld.

Those who have been accustomed to see, in criminal courts, even *human life* weighed against a collection of circumstances, will know the value of adhering firmly to these rules; and the great public interests, as well as private personal honour and integrity, with which a Select Committee of the House of Commons has to deal, are often vitally affected by the proper or improper application of these rules.

Finally—What circumstances will amount to PROOF, can never be matter of general definition. The legal test is,—the sufficiency of the evidence to satisfy the understanding and conscience of those who have to judge of it. Demonstration certainly is not essential. It is sufficient if circumstances produce moral certainty, to the exclusion of every *reasonable* doubt. Even direct and positive testimony does not afford grounds of belief of a higher or superior nature.†

These general principles acquire vast additional interest and importance, in civil cases, now that exclusion of witnesses, on the ground of interest, is totally abrogated, and judges and juries have devolved upon them, a commensurately increased, and often extremely painful responsibility.

The ATTENDANCE of witnesses on the Select Committee, is secured, *before* its appointment, by a “SPEAKER’S WARRANT,” ‡ obtained on the application of the parties to the petition. This he issues, without a special order of the House in each case, under a general order, given when the petition is presented, “that Mr. Speaker do issue his warrant for such PERSONS, PAPERS, and RECORDS, as shall be thought neces-

* Where it is certain that one of two persons committed the offence charged, but it is uncertain which of the two, neither of them can be convicted. Starkie, p. 860.

† Id. p. 865.

‡ See it, post, p. 456, Appendix, No. 5.

sary by the several parties on the hearing of the matter of the said petition." Disobedience to a Speaker's warrant thus issued, has always been punished in the same manner as disobedience to a special order of the House.* *After the appointment* of the Select Committee, the witnesses are summoned by order of the committee, signed by the Chairman,† who, if either that summons, or the Speaker's warrant, be disobeyed, reports it, by the direction of the committee, to the House, for the interposition of its censure or authority, as the case may be; and may, by a warrant, commit the offender for twenty-four hours to the custody of the Serjeant-at-Arms.‡ The House will act with great severity in such a case, unless appeased by satisfactory explanations.

A member of the House attends before the Select Committee, in compliance with a request to that effect, by the committee. He is not *summoned* to attend. There is no instance on record of a member persisting in a refusal to do so; but orders of the House have been necessary to ensure his attendance. On the 28th June, 1842, a committee reported that a member had declined complying with their request that he should attend before them: on which a motion was made for ordering him to attend the committee, and give evidence. Having, however, at last expressed his willingness to attend, the motion was withdrawn. §

When a witness, who is *in custody*, is required to attend the Select Committee, the proper course is to notify it to them, and request them to apply to the Speaker for his warrant for the attendance of such witness.|| In the *Lichfield* ¶ case [A. D. 1842,] the question directly arose, under stat. 4 & 5 Vict. c. 58, s. 74, which is identical with the 83rd section of the Election Petitions Act, 1848, whether the Chairman of a Select Committee had power, under the words, "*send for* persons, papers, and records," to order the attendance of two persons, one in Newgate and the other in the Fleet Prison. The chairman referred the matter to the House, on a motion that

* 82 Commons' Journ. 351; May, 308.

† Elect. Pet. Act 1848, s. 83; post, App. No. 10, p. 459, Appendix, No. 10.

‡ Elect. Pet. Act, 1848, s. 83.

§ Comm. Journ. 97, p. 438, 438. 453, 458; May, 309.

|| *Harwich*, 1851, Printed Min. iv.

¶ B. & Aust. 373.

“*the Speaker do issue his warrant,*” &c. It was stated that high authorities differed as to the power of the chairman; and Sir Robert Peel being appealed to, said that he did not think that the act “contemplated the case of a witness being in custody.” He thought that the chairman’s summons would not be a sufficient authority to the keeper of Newgate, to bring up a prisoner to give evidence. As the section especially contemplated persons being “summoned by the Select Committee, *or by the warrant of the Speaker*, which he may issue from time to time, as he thinks fit,”—he thought the proper course was to obtain the Speaker’s warrant, which was ordered accordingly.*

Before a witness can be examined, he must be paid HIS EXPENSES, if he then demand them, as he is entitled to do in a court of law. This matter was settled in the year 1833, by the Speaker, when appealed to by the taxing officer:—but the only expenses thus *then* demandable, are the expenses necessary to enable him *to come* before the committee:—for the recovery of others, he must pursue the course directed by the 94th section of the Election Petitions Act.† It is obvious that it would be impossible to enter into a proper adjustment of these latter, at the moment of the witness appearing before the committee. The resolutions of the *Southampton* and *Lyme Regis* committees, cited beneath, were,—“That the petitioners be *forthwith* required to pay, or tender payment, to the witness, of all the legal and necessary expenses he has incurred, or may incur, *in proceeding to London*, to be examined; together with the necessary expenses of conveying and keeping in safe custody the documents he has brought with him for examination—for *all other* expenses the witness must apply to the Speaker, under”—*now*, stat. 11 & 12 Vict. c. 98, s. 94.

Witnesses in any way “MISBEHAVING” THEMSELVES, are dealt with sternly and summarily,

If a witness—

Give false evidence; or,

Prevaricate; or,

Otherwise misbehave, in giving, or refusing to give, evidence—

* Hans. vol. 62, p. 1116.

† *Hertford*, P. & A. 561 [A. D. 1833]; *Warwick*, id. 573; *Southampton*, B. & Aust. 380; *Lyme Reg.* id. 460.

the chairman may report the offender to the House, and commit him, in the meantime, for twenty-four hours, to the custody of the Serjeant-at-Arms, to await the decision of the House concerning his misconduct. Fair warning is given to all, by the Sessional Orders,* that “if it shall appear that any person hath given false evidence in any case before this House, *or any committee thereof*, this House will proceed with the utmost severity against such offender:” and, moreover,—“If it shall appear that any person hath been tampering† with any witness, in respect of his evidence to be given to this House, or any committee thereof, or directly or indirectly, hath endeavoured to deter or hinder any person from appearing or giving evidence, the same is declared to be a high crime and misdemeanor; and this House will proceed with the utmost severity against such offender.” And in addition to this, it is expressly enacted by the Election Petitions Act (1848),‡ “that every person who wilfully gives false evidence before the House of Commons, or before *any election committee*, or before the examiner of recognizances or taxing officer of the House of Commons, under the provisions of the act, or who wilfully swears falsely in any affidavit authorised by this act to be taken, shall, on conviction thereof, be liable to the penalties of wilful and corrupt perjury.”

The *St. Alban's* Committee§ [A.D. 1848] committed a witness to the custody of the Serjeant-at-Arms, for *hesitation* in giving his evidence, after having been several times cautioned in vain.

The *Lancaster* (1st) case|| [A.D. 1848] reported one Dodgson to the House, for prevarication; the House resolved that he was guilty of a breach of its privileges, and ordered him to be committed to the custody of the Serjeant-at-Arms, who should bring him from time to time to the committee, as often as they should require him, and that warrants should be issued accord-

* Post, p. 454, A.

† It was held by the *Cheltenham* Committee [A. D. 1848], that offering a bribe to a witness to keep away, after he had received the Speaker's warrant, was an attempt to interfere with the privileges of the House of Commons; and that the committee would proceed to inquire into it at once, without the assistance of counsel, so as to enable parties to meet the charge.”—Printed Min. p. 89.

‡ Sect. 85.

§ Printed Minutes, p. 72.

|| Printed Minutes; P. R. & D. 42.

ingly.” On the ensuing day, he was brought in custody before the committee, who reported to the House, at its next sitting, that he had answered to their satisfaction all such questions as they thought him bound to answer; on which the House ordered him to be discharged from custody, without payment of fees.

The *Southampton* case* [A.D. 1842] affords an interesting and useful illustration of the course taken by witnesses deemed to be contumacious, even when influenced, apparently, by an anxious desire for that protection which the law holds out to witnesses against being compelled to answer questions tending to criminate themselves; and also fully establishing the proposition laid down in an earlier part of this chapter, that it is not for the witness alone, but the committee, to judge as to the propriety of the impugned question being answered. One *Wren*,† having stated that he had lent a voter £10, was asked—where he got it? This question he declined answering, on the ground “that he wished to shield himself from any imputation which might afterwards lead to a chain of evidence which might criminate him.” In answer to a question from the chairman, he stated, “on my oath, the answer may, in my opinion, criminate myself.” On this the witness was ordered to withdraw; and, after argument, he was called in and ordered to answer the question:‡ and not only that, but several subsequent ones, to all of which he objected, on the same ground. At length, on being asked,—“What passed between you and these gentlemen, in the room up-stairs, on that evening?” he answered,—“This is a question which I must decline to answer, as I consider it calculated to do me some serious injury.” Having been ordered to withdraw, he was required, on his return, to answer the question: when he stated, “I must still decline answering it. I am in the hands of the committee, but cannot answer it. I am of opinion that the answer will criminate me.” Upon this he was committed to the custody of the Serjeant-at-Arms, and the chairman reported the facts to the House at its next sitting. *Wren* was thereupon brought to the bar of the House, and interrogated. He repeated the objection which he had made before the committee, but said that he should bow to

* Barr. & Aust. 388.

† Barr. & Aust. 380.

‡ By a majority of four to three. Minutes, p. 4; Barr. & Aust. p. 384.

the decision of the House. It was then* moved that he “be brought to the bar, and informed that the legal tribunal to decide on his obligation to answer questions, is the committee; and that, as he had declared his readiness to submit to the authority of the House, he be discharged.” There was hardly a difference of opinion expressed among the members of the House, especially among the legal members, including the Attorney and Solicitor-General, and Sir Thomas Wilde (now Lord Truro), as to the propriety of leaving it to the Select Committee, as a judicial tribunal, governed by the same rules of law and evidence as any other tribunal, to determine whether the question put to a witness was such as he ought to answer. Sir Thomas Wilde stated that “the rule acted on for the last forty years, was to require the witness to state as much of his answer as would enable *the judges* to decide whether it would criminate, or have a tendency to criminate, himself: but it never was the rule to allow him to avoid answering a question, merely by *saying* that his doing so would criminate himself.”

In the recent case of *Fisher v. Ronalds*† [November 25th, 1852], the Court of Common Pleas determined this important point somewhat differently. A witness, called to prove a plea that the money sought to be recovered had been lost at play, said that he was present when the money was alleged to have been lost in his own house, but saw no gaming. He was then asked, “*Was there a roulette-table in the room?*” On this the *plaintiff’s* counsel interposed, to object that the witness was not bound to answer the question, as the answer might tend to subject him to a criminal charge.‡ Mr. Justice Cresswell, than whom none was ever more punctitiously exact, and able, in trying a case at *Nisi Prius*, without censuring the interposition, told the witness that he was not bound to answer the question; and the witness declined to do so. A new trial was moved for; and it was urged that the judge ought not to have cautioned the witness, till he had claimed his privilege. On this, Mr. Justice Maule said, that the judge ‘would not be wrong, if he were to caution a witness before every answer: that in Lord Cardigan’s case, before the House of Lords, the witnesses were cautioned, before they claimed their privilege.’ It was then argued, that the witness

* Hansard, 25th April, 1842.

† 22 Law Journ. N.S. 62 (C. P.)

‡ Ante, pp. 591—595.

had refused to answer too soon; on which Mr. Justice Maule cited the case already quoted* of *Reg. v. Garbett*. It was then urged, that, so soon as the witness objected, it was for the judge to determine whether his answer might tend to criminate him. Mr. Justice Maule answered, “it is for the witness to exercise his own judgment in the matter, and to say whether his answer will criminate him. He might be asked this very simple question: ‘Were you in London on *such and such* a day?’ and he might object to answer it, well knowing that if it were proved that he *was* then in London, it might lead to his being hung. How is a judge to know all that? If he require a witness to point out *how* his answer will criminate him, the privilege is worth nothing. . . . The court and the parties are bound by the answer, if the witness says, on his oath, that his answer may have that tendency. The rule is of great antiquity, and no practical inconvenience has arisen from it.” The whole court upheld the propriety of the course taken at the trial; Mr. Justice Maule, in his judgment, saying,—“If the witness here was compellable to answer the question put to him, a man might be made to prove himself guilty of murder. It might be proved that a murder was committed by some one of ten persons in a room, and that the witness was one of the ten, and then he might be asked, ‘Did A. do it?’ and he might answer, ‘No,’ and so on till he had answered all the nine; and then there would be no need to ask him anything further.” Had these opinions prevailed with the committee, in Wren’s case, the result might have been different.

There are three WARRANTS which the Speaker is empowered to issue, for the purpose of an Election Committee,—

- (1.) A warrant for the mere attendance of a WITNESS, [equivalent to a *subpœna ad testificandum*.]
- (2.) A warrant where the witness is required *to bring with him* papers, books, or records, [equivalent to a *subpœna duces tecum*.]
- (3.) A warrant for the INSPECTION, and production, of PUBLIC papers and records.

These threefold means of supplying itself with all necessary witnesses and documentary evidence† the Select Committee, also, possesses, as we have seen, by the 83rd section of the Election Petitions Act, 1848. The former two warrants are analo-

* Ante, p. 593.

† Ante, p. 285.

gous to, and similarly compulsory with, the two writs above referred to, of *the subpoena*, and *subpoena duces tecum*: the latter of which runs thus:—"We command you, also, that you bring with you, *and produce* . . . a certain instrument, purporting to be an indenture of lease made between A. B. of the one part, and C. D. of the other part, and dated the 12th day of March, 1853:" being so specific as to afford him no pretence for disobedience, on the ground that he could not tell *what* he was required to bring and produce. The second of the above Speaker's warrants, in like manner, runs thus:—"To *bring in your custody*" the accurately specified documents, and "*therewith* to be, and appear before the Select Committee, at such time or times as shall be notified to you by the parties, or either of them, to the said petition, or their, or either of their agents or agent, and to receive and obey *such further order* as the said Select Committee, appointed to try the matter of the said petition, shall make concerning the same:—as you will answer the contrary at your peril."*

The correspondence between this instrument and the *subpoena duces tecum*, was exhibited in the *Bewdley* case [A.D. 1848].† A bill for printing notices and circulars having been traced into the hands of an agent of the sitting member, and that agent having been served with the second of the above warrants, the petitioner's counsel called on him to produce them, without entering the box as a witness. This was resisted, on the ground of the undue generality of the warrant; but the objection was overruled. The witness was then required, "upon the warrant," to produce the accounts of the election. He stated that he had not got them. It was correctly answered that "a witness served with a *subpoena duces tecum* was bound to bring into court any document included in it; that here documents *had* been specified, and the witness had not produced them;" and counsel "called on him to obey the Speaker's warrant; . . . if he refused, counsel must request the committee to take further steps." The committee, however, after consideration, declared that they "would not take the proceedings that were suggested, *unless the petitioners chose to make him a witness, by having him sworn in the regular way.*"

If there be the suggested correspondence between parliamen-

* Post, p. 457, A., Appendix, No. 6.

† Printed Minutes; P. R. & D. 64.

tary and common law process, the witness was bound at all events to obey the warrant, by attending and bringing the instrument in question, if he had the power of doing so, and producing it in evidence, on being ordered to do so, unless he had some lawful excuse for withholding it, of the validity of which excuse the committee, and not the witness, was to judge.* If the instrument be in his *actual* possession, he cannot excuse himself on the ground that the legal custody of it belongs to another person, or that the production of it is immaterial. Provided, however, it would, if disclosed, subject the party producing it to a criminal charge, or penalty, or forfeiture,—or if it be his own title deed, or that of his client; or if he have a lien on it:—in none of these cases will the court or a committee, compel him to produce it. When, however, its production is thus excused, the party who had called for it, having done all he could to obtain the *best*, is entitled to give *secondary*, evidence. If the court order him to produce the instrument, and he disobey, without lawful excuse, he will be liable to an attachment for contempt of court, or a special action, at the suit of the party injured, for damages.

In the *Bewdley* case, therefore, according to the Report, the witness was guilty of disobedience to the warrant, and liable to punishment.

In the election books are to be found numerous arguments and decisions based on the rules relating to *Notices to produce*, and *Subpœnas duces tecum*; and certain recent changes in the law may justify some observations on those instruments.

The law of England has hitherto not enabled one party to a cause to compel his opponent to produce any writings in his possession, however necessary they may be for the prosecution of the former's suit.† If such evidence be required, the rule is, in both civil and criminal cases,‡ to give the opposite party, or his attorney, within due time, a valid “NOTICE TO PRODUCE” the original, in his possession. The exact legal effect of this procedure has been recently declared by the deliberate judgment of the Court of Exchequer [A.D. 1852], in the case of *Dwyer v. Collins*,§ delivered by Baron Parke. “The *true principle* “on which a notice to produce a document on the trial of a

* *Amey v. Long*, 9 East, 473; *Newton v. Chaplin*, 10 C. B. 356.

† *Entick v. Carrington*, 19 Howell's State Trials, 1073.

‡ *Attorney-General v. Le Merchant*, 2 T. R. 201, n.

§ 7 Exch. Rep. 639.

“cause, is required to be given to the opposite party, is—
 “merely to afford *him a sufficient opportunity to produce it*,
 “and thereby to secure, if he please, the best evidence of its
 “contents:—and a request to produce it immediately, if it be
 “in court, is quite sufficient for *that* purpose:” thus upholding
 the propriety of the course which had been taken by the judges,
 in the case then before the court. If, however, the desired instru-
 ment be in the hands of a *third person*, *he* is liable to produce it,
 on a *subpœna duces tecum*, subject to the conditions which have
 been already explained, as to his being excused from doing so.*

These rules, and this distinction, prevailed when there was
 a corresponding distinction between *parties* to a cause, and
strangers. Now, however, as we have seen, by statute 14 & 15
 Vict. c. 99, a *party* is competent and *compellable*, equally with
 a stranger, to be ‘*summoned*’ as a WITNESS; and, as he
 may be subpœnaed to give evidence, so he may be subpœnaed,
 it is conceived, to produce admissible documents, equally with
 all other parties at any time subject to a *subpœna duces tecum*.
 It may, perhaps, be questionable whether the Notice to produce
 possesses its exclusive efficacy: for, since there are now direct
 means of getting at *the best evidence* by a *subpœna duces*
tecum addressed to the party, if those means have not been
 adopted, the proper ground for resorting to secondary evidence
 —viz. that *all proper* means to obtain primary evidence
 have been tried and failed—may be said not to exist. If a
party who has received such a ‘notice,’ choose to come into
 court without the documents which he might have been *ordered*
 to bring into court; may he not say to his opponent, that the
 latter was bound to know the law which would have enabled
 him to secure the best evidence—and not having done so, he is
 entitled to resort to inferior evidence?†

At all events, the effect of stat. 14 & 15 Vict. c. 99, seems to
 have been to place parties and strangers on the same level as to
 liability to be summoned (*sub-pœnaed*) as witnesses, under a
 subpœna with a *duces tecum* clause: and if those so served,
 refuse to produce the instruments, they are guilty of a contempt
 of court; and *ipso facto*, entitle their opponents to give secondary
 evidence. Thus, also, the Speaker’s warrant is to be likened,
 with reference to documentary evidence, to the *subpœna duces*

* Ante, p. 616.

† *Newton v. Chaplin*, 10 C. B. 356.

tecum ; all are bound to obey it, at their peril ; and only one of the consequences of disobedience, is—liability to inferior secondary evidence being adduced of that which had been ordered by the warrant. If this be so, it is advisable to be explicit in specifying the documents of which production is required. The witness is ordered at his peril to bring them ; the committee deciding equitably as to his liability to produce them, and in conformity with the established rules which regulate English courts of justice. It is to be observed that the Speaker's warrant or Chairman's order must be served on the witness reasonably early, in order to enable him to comply, by attending and producing the various documents required.

By the 119th section of the Common Law Procedure Act, passed on the 30th June, 1852, (stat. 15 & 16 Vict. c. 76,) and which came into operation on the 24th October, 1852 (§ 1), the notice to produce is expressly recognized, by a provision facilitating proof of it. It is possible that the framers of the act did not contemplate the legislature's being about to render *parties* competent and compellable witnesses, by the act for that purpose which had been passed on the 7th August, 1851, and came into operation on the 1st November, 1851. The case of *Dwyer v. Collins** was decided on the 8th May, 1852 ; and no allusion made by the counsel or the court to the recent act, enabling the parties to be examined as witnesses.—The practical result would seem to be, that a party is now compellable, without being sworn or examined, to bring the instrument bodily into court ; and if then excused from producing it, secondary evidence may be given. If, however, he be not served with a subpoena *duces tecum*, his opponent may serve him with a notice to produce ; and on his refusal—which he is entitled to make independently of any permission from the court—secondary evidence may be given.†

A witness, whose evidence is required before a Select Committee, cannot be examined by any but that tribunal, as soon as it is duly constituted. In the year 1842, an attempt was made by the agent of the sitting member, to induce the House of Commons to call Sir Thomas Cochrane to the bar, to be examined as to matters touching the petition pending before the Select Committee. The agent had applied to the witness, on hear-

* Ante, p. 616.

† *Newton v. Chaplin*, 10 C. B. 356.

ing that he was going abroad in ten days' time on foreign service, to make some arrangement for taking his evidence; but Sir Thomas refused to do so. He was then asked, whether he intended to take no notice of the Speaker's warrant? He replied, "that he should not express anything further respecting his intention." On this it was moved in the House "that Sir Thomas Cochrane do attend at the bar of this House to-morrow:" but the motion failed.* The House truly said, that it had no power to take the evidence of a witness about to leave the country:—that the trial of a controverted election no longer comes within the jurisdiction of the House, but is transferred by statute to a particular tribunal; and that there was no more reason for the House to interfere in such a trial, than in ordinary trials in courts of law. That evidence taken at the bar of the House could not be available before the Select Committee; for the evidence on that trial is, to be given before the committee before whom the trial takes place, and before whom all documents must be produced. That the House has no power to take evidence on oath; and consequently that for statements not on oath to be made by Sir Thomas Cochrane at the bar of the House, and then repeated to the committee by some third person who had heard him, was against the most elementary principles of evidence. For these and other cogent reasons, highly illustrative of the independent and exclusive jurisdiction of a Select Committee, the House refused to entertain the motion.

It is a salutary and inflexible rule, announced as one of the preliminary resolutions of each committee, that all witnesses must **WITHDRAW FROM THE COMMITTEE ROOM** as soon as the petition has been read: and, it is added, that no person shall be examined as a witness, who shall have been in the room during any of the proceedings, with the exception of the agents whose names shall have been handed in, *without the special leave of the committee*. No member of the House, not a party to the petition, is exempted from the operation of this rule. He has no right to be present in the court, except as one of the public: but whether a sitting member or petitioner be entitled, as a party, to be present, as has frequently been allowed during the session 1853, may be a different matter; since whether he do or do not desire it, he may be examined as a witness. It would be, it is presumed, for the committee to exercise their discretion: for the statute 14 & 15 Vict. c. 99, s. 2,

* *Hansard*, vol. lx. pp. 884—898.

enacts that the parties must give their evidence “*according to the practice* of the court;” and it has been decided that a judge has no authority to order the parties out of court, seeing that they have a common law *right* to be there. In the recent case of *Cobbett v. Hudson*,* [20 Nov. 1852], also, it was decided, that however anomalous and objectionable it may be for a party to act as his own advocate, in addressing the jury, and afterwards give evidence as a witness in his own case, the second section of the statute did not *abridge the former right* of a party to act as his own advocate.—With respect to ordering witnesses out of court, Lord Campbell, in delivering the well-considered judgment of the court in the last-mentioned case, thus stated the law, after adverting to the practice at a trial, of ordering witnesses to leave the court. “Though this be clearly within the power of the judge, and he may fine a witness for disobeying this order; the better opinion seems to be, that his power is limited to the inflicting of the fine, and that *he cannot lawfully refuse to permit the examination of the witness.*”

It is peculiarly within the discretion of the committee, as to who may be allowed to remain in the room; and many questions arose respecting these matters, during the trials of the election petitions of 1848. Committees have allowed witnesses to remain (the town clerk, and also a reporter for the local newspaper) by consent of both parties:† one not a professional man, but a partner of the sitting members,‡ was allowed to remain as agent, though he might be required as a witness:—one called merely to prove handwriting§ (but another committee refused to allow a witness to be recalled for this purpose, having been in the room since his examination):|| one in the room for only a short time, and who had heard the speeches of counsel, but not the point to which he was proposed to be examined.¶ Some committees, in short, have been as strict, as others indulgent, in exercising this right. In all such cases, however, it is probable that future committees will consider, with respect, the deliberate judgment of the Court of Queen’s Bench, in the above cited case of *Cobbett v. Hudson*.

* 22 Law Journ., N. S., 11 (Q. B.)

† *Leicester*, P. R. & D. 176.

‡ *Lincoln*, P. R. & D. 77.

§ *Aylesbury*, P. R. & D. 86.

|| *Kidderminster*, P. R. & D. 265.

¶ *Horsham* (2nd), 253.

It is another rule of Select Committees, rigorously adhered to, from obvious considerations of justice and policy, that the evidence shall be limited to the case opened by counsel. It would be monstrous to allow essential and new facts to be supplied from time to time, to suit the exigencies of a keenly-contested case; and equally so, to expect an opponent to come prepared to meet new and more serious facts than counsel had alluded to in the preliminary statement. Ample opportunities are afforded, by the course and practice of parliament, for getting up the most extensive and complicated facts; and adequate precautions against fraud or surprise are afforded by the rule in question, and by requiring lists to be handed in, in cases of scrutiny, and bribery and treating. These matters, however, will be best discussed in the ensuing chapter, when explaining those parts of the Preliminary Resolutions which relate to them.

The BURTHEN OF PROOF rests on the party substantially asserting the affirmative of the issue to be tried.

A vote is presumed to be a valid one, until impeached by evidence.* It is incumbent on the party making objections, to prove them.†

Thus, in cases of *personation*, the *onus* of disproving the identity of the person whose name stands on the poll, has been assumed by the objector: for which purpose, he may show how the lists were made;‡ the town clerk may be called to show which of two persons he intended to place on the freemen's lists;§ those on the poll have been called to show that they were not the persons described in the register;|| and declarations and admissions have been received for the same purpose.¶

Thus, also, in the case of the impeached qualification of a candidate;** and in the cases of incapacities, alleged before the revising barristers.††

The proof of proceedings before the revising barristers, when the Select Committee sits as a court of appeal from their de-

* *Cirencester*, 2 Fraser, 448; *Green's case*, P. & K. 187, 188.

† *Middlesex*, 2 Peck, 91.

‡ *Southampton*, P. & K. 221 [A. D. 1833].

§ *Rochester*, K. & O. 117 [A. D. 1834].

|| *Rochester*, id. 225, 242.

¶ *Southampton*, id. 223; *Taunton*, F. & F. 295.

** *West Gloucestershire*, P. R. & D. 11; ante, Chap. XXIII. p. 553.

†† Ante, pp. 168, 169.

cisions, has been already considered, in the chapter appropriated to the consideration of that subject.*

The all-important subject of agency was discussed at length in the previous chapter. It cannot be too carefully borne in mind, that the rules of evidence for establishing *the fact of agency*, remain intact. It must still be proved by legitimate and appropriate evidence, as it always was, or ought to have been: except where the legislature shall interfere to annex a positive conclusive character and efficacy to particular acts; or has interposed, as in the case of statute 4 & 5 Vict. c. 57, to alter *the order of time* when the proof shall be adduced. In cases under that act, the best practical suggestion which can be offered, in order to steer clear of the numberless difficulties and dangers which may beset the course, is *to assume, at every step*, that all the circumstances offered in evidence will ultimately be made available by the crowning proof which attaches agency to the sitting member. It is the duty of the committee, to bear this in mind, or irreparable injustice may be done to either a petitioner, or a sitting member. These matters, however, have been already sufficiently discussed.†

A fertile source of difficulty formerly existed in proving the poll; but has now almost totally disappeared. In former times, *agency* and the *poll*, were the two all but inevitable stumbling-blocks; but they may be said to be now both removed out of the way. The first step to be taken, after reading the petition, is to establish the fact of the election; and the poll, legally authenticated, is the best evidence to prove—

That there was an election:

Who were the candidates:

And who polled at the election.‡

The Writ and Return prove no more than that *the sitting members were returned*.§ The return shows simple obedience to the writ, viz., in the case of a borough, that the electors have “freely and indifferently elected and chosen A. B., and C. D., Esquires, to be burgesses to serve for the said borough”—and in the case of a county—“have freely and indifferently elected and chosen two knights, of the most fit and discreet of the said county, girt with swords, to wit, E. F. and G. H., to be knights of the said parliament for the

* Ante, p. 347, *et seq.*, Chapter XVIII. † Ante, p. 480, 481, 579.

‡ Rogers on Election Committees, 130.

§ Reading, B. & Aust. 414 [A. D. 1842], *arguendo*.

commonalty of the county of .”* When, therefore, the petition is produced, it is found to point to the poll; and when that also is before the committee, they have the whole field of action, and those who may act on it, opened before them.

It is needless to say, that the witness called for no other purpose than to produce the poll, and examined no further than as to the authenticity of the poll-books, cannot be cross-examined beyond that point. The attempt was made in two instances, in the year 1842, but in vain: in the *Weymouth*,† and the *Blackburn* cases:‡ the committee requiring, in each instance, the cross-examination to be confined to the poll-books.

The course of procedure at and after the election, with reference to the safe custody of the poll-books, in English elections, has been explained in full detail, in a previous chapter:§ where it will be seen that the poll-books, immediately after the election, find their way to the clerk of the crown, who, on receiving a warrant from the chairman of the Select Committee, attends it, to produce the poll-books: and “such production shall be sufficient *primâ facie* proof of the authenticity of the said poll-books.”|| This act, it may be observed, was not passed till the year after the cases above cited were decided; nor does it affect the propriety of them. The first reported case, after the passing of statute 6 Vict. c. 18, with reference to the production of the poll-books, under s. 96, was that of *Dartmouth*.¶ The poll-books were produced by the clerk of the crown, who on being asked to put them in, hesitated; saying, that as they were deposited in the custody of the clerk of the crown, and as he was an officer of the House, they were supposed to be in the possession of the House; and that the proper course, therefore, would be for himself to attend with them as often as the committee might require. The committee, however, was of opinion that the poll-books ought to be put in, and they were accordingly delivered to the committee clerk, and put in.

It is to be observed, that the statute constitutes this production of the poll-books, only *primâ facie* evidence of authenticity;

* Post, Appendix, pp. 447, 448.

† *Weymouth*, B. & Aust. 106 [A. D. 1842].

‡ Id. 321; and see the cases cited at note (1), p. 322; and *Ipswich*, K. & O. 339.

§ Ante, p. 222, *et seq.* Chapter IX.

|| 5 & 6 Vict. c. 18, s. 96, post, 309, A.

¶ B. & Arn. 460 [A. D. 1845].

leaving it open, to those interested, to impeach that authenticity by any facts available for that purpose, as by showing non-compliance with statutory requisitions. Various objections were taken, before the committees of 1848, on these grounds, but in every instance ineffectually. The provisions of the statute in, for instance, s. 93, were held directory only.* Only slight evidence of identification was required.† In one case,‡ the returning officer had not *sealed up* the poll-books, thinking it needless, as he never parted with them till he delivered them to the clerk of the crown; and had not *tendered them* to the candidates to be sealed, because they had left the town before he had the opportunity of doing so. For these reasons it was contended that the supposed poll-books “were no poll-books in the eye of the law, on the table of the committee:”—but the committee, without hearing argument on the other side, properly held the poll-books to be sufficiently proved.

If the poll-books, or any of them, are LOST, or DESTROYED, *secondary* evidence of them may be given, as explained in a former chapter.§

The proof of almost every kind of official and *quasi* official and public documents, which can be required to be adduced in evidence before the Select Committee, has been greatly facilitated and simplified by the statutes referred to at the commencement of the present chapter;|| and will be found, *in extenso*, in the various sections of the acts.¶

It may here be useful to explain *the principles* on which official registers—speaking especially of those all-important ones relating to births, marriages, and deaths—are received in evidence in this country, and the mode in which they are presented for that purpose.

These official registers, it will be observed, are admissible without their authenticity being confirmed by the test of the cross-examination of those who prepared them; and this, partly from public policy, and from the very necessity of the case. The entries thus made, being of a public nature, it would often be difficult to prove them by means of sworn witnesses:—but

* *Kidderminster*, P. R. & D. 262.

† *Aylesbury*, P. R. & D. 84.

‡ *Horsham* (2nd), P. R. & D. 248.

§ Ante, p. 409, note.

|| Ante, p. 584, *et seq.*

¶ Post, p. 306, *et seq.*

it is to be recollected that those entrusted with the duty of doing so, are responsible public officers; having no interest whatever in falsification or suppression of any kind; *liable* at any moment to detection, were such an infamous attempt to be made; and they are, moreover, generally speaking, persons of experience and integrity, with every motive to accuracy and vigilance. These entries are made, and their registers are kept, moreover, often under the sanction of an oath, or under that of official duty. To satisfy these conditions, however, a document sought to be admitted in evidence must be what *the law requires to be kept for the public benefit*; the entries must be made promptly; by the person required by law to do so; and in the mode which may have been prescribed by the law. Thus supported, documents come armed with great and rarely impeachable authority; and avail for almost every imaginable purpose, in evidencing, conclusively and permanently, in all courts of justice, both public and private rights.

In consequence of the great importance of preserving parochial registers in a state of security, the law allows their contents to be shown by proper copies; and the legislature frequently prescribes how such shall be made. In many cases, the parties who have the custody of these instruments are unwilling to allow them to be removed, and their production cannot be enforced: and that *non-production* is really for the public benefit.*—Questions constantly arise as to the *IDENTITY* of persons mentioned in these records; and in this matter the law is not unreasonable, and allowing for the difficulties often attending the production of such proof, seizes hold of slight evidence: such as a correspondence between the *names, trades, professions, residences, and ages* of parties.† Nay, in ordinary cases, “where no circumstances tend to raise a question as to the parties being the same, *mere identity of names* is something,” said Lord Denman,‡ “from which an inference may be drawn. If the name were only *John Smith*, which is of very frequent occurrence, there might not be much ground for drawing the conclusion: but *Henry Thomas Ryder*,” the name then in question, “are not so numerous. . . . The transactions of the world could not go on, if such an objection” as that founded on the want of strict evidence of identity “were to

* Per Parke, B., *Sayers v. Glossop*, 2 Exch. 411, 412.

† *Russell v. Smyth*, 9 M. & W. 314; *Smith v. Henderson*, id. 798.

‡ *Roden v. Ryde*, 4 Q. B. 633.

prevail. It is unfortunate that the doubt should ever have been raised ; and it is best that we should sweep it away as soon as we can." This is one of those instances of vigorous good sense in the administration of justice, which characterized that distinguished judge.

In the recent case of *Sayer v. Glossop* already referred to, in order to prove a marriage, an examined copy was given in evidence of marriage between one Joseph Glossop and the female defendant. A witness proved that he knew Joseph Glossop, who was alive, and his handwriting ; and that the handwriting of the name "Joseph Glossop" in the register, was that of the person whom he knew. It was held by Baron Parke that this evidence sufficed, without producing the original register ; and the court sustained the ruling. "If in point of law," said the Lord Chief Baron, "you cannot compel a person who has the custody of a document to produce it, there is the same reason for admitting other evidence of its contents, as if its production were physically impossible." "I will carry my Lord's illustration a little further"—said the present Lord Cranworth, C., then Baron Rolfe. "Suppose we heard that placards, containing treasonable words, were posted up : and that a witness were to say—he saw a man chalk certain words up, and that *those words were in the handwriting of A. B.* : surely that would be good evidence against A. B., as the production of the writing itself would be impossible."* "I think," said Lord Abinger, in the case of *Mortimer v. M'Callan*,† "a case has been aptly put by my brother Alderson :—if a writing were on a wall, might you not give evidence of the character of the handwriting, as probable evidence of who wrote it, without producing *the wall* in court?"

It has been thought useful to cite these authorities, because they are applicable to points often raised suddenly, in cases coming before committees, and requiring *principle*, in order to dispose of them promptly and satisfactorily.

A case‡ before a recent Select Committee affords a strong illustration of the necessity of accurate information being possessed by its members, of the leading principles of the law of evidence. It had become necessary, in a scrutiny, for the pur-

* 2 Exch. 411.

† 6 M. & W. 68.

‡ *Preston's case, Lancaster* (2nd) [A. D. 1848], P. R. & D. 161—164.

pose of invalidating a vote on the ground of the voter's having received parish relief, to prove his marriage. The superintendent registrar before whom it had been celebrated, and the marriage register, signed by himself, were before the committee: the entry was also, in conformity with the act (6 & 7 Will. 4, c. 86), signed by two witnesses of the marriage, one of whom was dead; and the other, eighty years old, being ill and infirm, had not been brought to London. The committee actually refused to receive, as proof of the marriage, the evidence of the superintendent registrar who had been present at it; or of subsequent cohabitation as man and wife; or the register itself, made and signed by the superintendent registrar himself, present before them: conceiving that it was necessary, "*as the best evidence*," to call the surviving witness of that marriage. They refused, moreover, an adjournment, for the purpose of adducing medical evidence of the inability of that 'witness' to attend. These facts appear scarcely credible; but they are on record, together with the arguments and authorities pressed upon the committee. Here was abundantly ample evidence to prove the fact of marriage,—evidence acted upon daily and hourly in the most important cases coming before courts of justice, for at least a century,—yet rejected by a court of justice of the highest dignity, and whose judgments are absolutely final and irrevocable. The evidence thus rejected, might have affected the sole remaining vote on which a month's ruinously-expensive scrutiny was depending.

The proof of IRISH polls corresponds precisely with that of English polls, by the recent statute. *

The proof of SCOTCH polls depends, at present, upon statutes 2 & 3 Will. 4, c. 65, ss. 32, 33, 34,† and 5 & 6 Will. 4, c. 78, ss. 6, 7, 8.‡ While these acts make due provision for the authenticity and safety of the poll-books *during* the election, they contain none similar to the valuable enactments recently introduced into the English and Irish statutes, for the safe custody of the polls *after* the election.

Scotch polls are produced before the Select Committee, by the sheriff clerk of the county in which the election occurred. In these cases, also, committees properly show a disposition to discourage captious opposition to the admissibility of the polls,

* 13 & 14 Vict. c. 69, ss. 99—102, post, 137, 138, A.

† Post, pp. 29, 30, A.

‡ Post, p. 40, A.

though considering in one instance, that the poll-books had been "kept very carelessly."* They had, for a short time, been in the custody of a clerk of the agent of the sitting member: but the clerk proved that they had not been altered, whilst in his custody. A strenuous effort was made, but in vain, to induce the committee to reject the poll-books.

Thus much for the evidence by which all necessary facts are to be established to the satisfaction of that important court of justice, a Select Committee: a branch of the law which has been recently so materially modified and improved by the legislature, as greatly to facilitate the administration of justice before a tribunal formerly as much harassed and fettered by complicated and refined technicalities, as were the other courts of justice.

The immense changes effected by the act enabling and compelling PARTIES to be examined—those most deeply interested, in the just adjudication upon litigated rights and liabilities, and best *able* to throw light upon them—are such as have already effected a complete revolution in the administration of justice in this country. Those changes have *extensive ramifications*, which require to be watched with great care, in adapting the old to the new law of evidence.

* *Invernesshire*, K. & O. 300, 302 [A. D. 1835].

CHAPTER XXVI.

PRACTICE.

It cannot be too frequently repeated, that a Select Committee is, to all intents and purposes, a judicial tribunal, formed of members of the House of Commons,—as much a judicial tribunal as the Court of Queen's Bench would be, if the House of Commons had conferred on it the power of deciding on election petitions:—and that (with one or two special exceptions) the same rules of evidence and law prevail there, as before any other tribunal.† By the '*practice*' of a Court, is meant simply its mode of procedure, as regulated by statute, or common law. The latter, is evidenced by usage: for the acquiescence in constant proceedings, as well by the judges, as by its experienced officers, denotes that those proceedings are reasonable, and conducive to the orderly and efficient administration of justice; seeing that had they been found objectionable, a change would soon have been effected in them.‡ When once a course of practice has been thus settled, having stood so many tests of fitness, it ought not to be departed from without great caution, and after due deliberation. It is better that an individual inconvenience should be submitted to, than that it should disturb the operation of a rule which has prevented a thousand such: wherefore, in every application to the court to relax a rule of practice, it discreetly weighs the matter in its bearings and consequences, and pauses before creating a precedent. If unduly pressed on any particular exigency, by arguments drawn from *hardship*, it may be well to act upon the celebrated apophthegm of Lord Tenterden, *hard cases make bad law*. If a rule is to be relaxed on every pinching application of it, surely it ceases to be a rule, and should be in terms abrogated.

These observations may show the propriety with which Select Committees adhere to the settled order of procedure; and the result is, a much closer approach towards system and uniformity, than the fluc-

* Hansard, vol. 62, c. 1061. Lord J. Russell (25th April, 1842).

† Ditto, c. 1065. Sir W. Follett (ditto).

‡ See Chit. Gen. Prac. of the Law, iii. p. 35.

tuating condition of election law might have excused. The manifest object of the committee is to act according to law in every instance, and *do all things decently, and in order*: to consult at once private and public interests, by economising time and expense, but not by impatience or precipitation: for they remember that the JUDGMENT which they are ultimately to pronounce, is conclusive, and irreversible. Rules are prescribed for the due performance of their respective duties, by witnesses, counsel, and agents,—and, in short, the court is armed with all necessary authority for conducting its proceedings throughout, with dignity and effect.

On a reference to preceding chapters, it will be found that several important topics, usually appearing under the head of “Practice,” in Treatises on Election Law, have been already disposed of.

The sixteenth Chapter,* is devoted to the PETITION, and the PETITIONERS.

The seventeenth Chapter,† to LISTS OF OBJECTIONS TO VOTERS, in cases of SCRUTINY.

The six Chapters,‡ also, devoted to “THE JURISDICTION OF THE SELECT COMMITTEE, ORIGINAL AND APPELLATE,” will be found frequently dealing with matters which might have been separately, though, as it was conceived, less advantageously discussed under the head of Practice.

The twenty-fourth Chapter,§ on AGENCY; and

The twenty-fifth Chapter,|| on EVIDENCE, will be seen to contain many topics also referable to the head of Practice, and capable of being discussed as satisfactorily under any of these three heads.

This was designedly done, in order, as far as practicable, to restrict the present chapter to those topics which appear to fall strictly and legitimately within its scope and limits—viz. the practical procedure of committees, and the parties before them.

The constitution and functions of the Select Committee itself have been fully explained in the fourteenth Chapter.¶ When it has once been formed, ‘the legality of its appointment cannot be called in question on *any ground whatever*.’** On its first assembling, the names of the members are called over; and if all be present, the room

* Pp. 301—322.

† Pp. 323—328.

‡ Pp. 328—559.

§ Pp. 560—580.

|| Pp. 581—628.

¶ Ante, pp. 271—289.

** Election Pet. Act, 1848, s. 68, ante, pp. 283, 284.

is cleared for deliberating upon the order of procedure. The parties are then called in, and informed that the committee has come to certain RESOLUTIONS, called "PRELIMINARY," or "The usual Resolutions," and which are, in effect, a little code of election practice, with reference to the principal points, and adopted with little variation by almost all election committees.* Occasionally, however, this is not the case. The *Lyme Regis* committee, for instance,† passed only one for the exclusion of witnesses from the room.

PRELIMINARY RESOLUTIONS.

I. That counsel will not be allowed to go into matters *not referred to in their opening statement*; without a special application to the committee for permission to do so.

II. That if costs be demanded by either party under the statute 11 & 12 Vict. c. 98, the question must be raised *immediately after the decision on that particular case*; unless the committee shall otherwise decide.

III. That the committee expect that, with respect to cases of BRIBERY, which it is intended to bring home to the sitting member, or his agents, the counsel for the petitioners will *now state the names* of the electors bribed, and those of the persons who actually gave the bribes:—

IV. The committee, however, reserving to themselves a power, upon the special application of counsel, to proceed with any case which tends to inculcate any principal or agent, the knowledge of which case has been brought out before the committee *in the progress of the investigation*; and of the circumstances of which, the parties cannot be reasonably supposed to have been previously cognizant.

V. That with respect to TREATING, the committee will expect counsel to state the *times* and *places* where such treating is alleged to have taken place:—

VI. The committee, however, reserving to themselves a discretionary power, as in the case of bribery.

VII. That *all witnesses do withdraw*, and that no person shall be examined as a witness who shall have been in the room during any of the proceedings (with the exception of *the agents whose names shall be handed in*), without the special leave of the committee.

* Those used in the Carlisle Committee of 1848 have been selected, with only slight variations suggested by a consideration of the resolutions of many committees.

† Print. Min. p. 1, A.D. 1848.

The chairman of the *Aylesbury* case,* [1851], subjoined to these resolutions the following authoritative and significant intimation.

“That the committee had further instructed him to inform counsel that they hoped that, in conducting the case, counsel would confine themselves, with reference to points, as far as possible, to the quotation of legal, and not parliamentary decisions.” †

The main object of these resolutions is, to do justice towards those subjected to charges of bribery and treating, by securing them against surprise; and at the same time to reserve to the committee ample discretionary power, on the special application of counsel, of following up disclosures made incidentally and unexpectedly in the course of the evidence. The provision respecting costs, is intended to secure application for them being made to the committee while the facts of the particular case, in respect of which the application is made, are fresh in their mind. The remaining resolution, prohibiting the examination of all but the specified witnesses, without the special leave of the committee, was the subject of discussion in the preceding chapter.

A reference to the appendix will show the necessity of vigorous efforts being made by the committee to avoid perplexity and confusion in dealing with even a solitary petition,‡ which may be levelled at the return of all the sitting members for a county or a borough; and embrace as against all, or any of them,—who, again, may sever in their defences,—every ground enumerated in the six preceding chapters appropriated to these subjects, for avoiding the election; including bribery, treating, violence, disqualification, irregularities in the conduct of the election, and an extensive and complicated scrutiny. There may be, moreover, several petitions against the same, or several, sitting members; and they, in their turn, may exercise the right of attacking their opponents by recrimination.

A careful consideration of most, if not all the reported decisions of Election Committees, especially the *printed minutes* of those which sate in the session of 1848, may show a prevalent disposition on all sides, but by no means uniformly, to dispose first of those portions of the case which may at once conclude the inquiry. If, for instance, one part of the case be an imputed disqualification of the sitting member, as holding a disabling office, or contract, or in respect of a deficient property qualification, or any other personal disability to be

* George Alexander Hamilton, Esq., 1848.

† Print. Min. p. 7.

‡ See, for instance, the *Precedents of Petitions*, Nos. 16 to 22, both inclusive.

elected or to sit; or if there be any charge of an illegality in the conduct of the election rendering it wholly void, it is natural and reasonable to expect that such would be first disposed of, which would save a protracted and ruinously expensive and futile inquiry; and this has been recently done in more than one instance, without the consent, and even against the wish, of one of the parties.

These matters, however, will be adverted to in their order.

The preliminary resolutions having been read, the short-hand writer is sworn by the chairman,* well and truly to take down the evidence given before the committee; and from day to day, as occasion requires, to write, or cause the evidence to be written in words at length for the use of the committee. He also supplies copies of the evidence to the agents, if they require it. He is sworn only once, at the commencement of the proceedings. The minutes of the evidence are in practice often amended on the consent of the parties; but this ought to be done very cautiously, for the House may afterwards require, as they usually do, the minutes to be printed; and it may be of importance for them *to see* how a particular witness has varied or prevaricated in giving his testimony. In Courts Martial the rule is very strictly observed. No question or answer can *under any circumstances be erased or obliterated* when once recorded on the minutes; though any qualification or explanation that may be deemed expedient, may afterwards be added. The reason assigned is, that the authority which has to review the sentence should have the most ample means of judging, not only of any discrepancy in the statement of a witness, but of any incident which may be made the subject of remark by either party in addressing the court.† The decision of the Select Committee, it is true, is final between the parties; but they are required to specify *names* in their report to the House, with reference to serious charges, exposing them to penalties and punishments; and the committee is also at liberty to report to the House any other matters they please.‡ If it be known moreover that *litera scripta manet*, that consideration will render both counsel and witnesses more careful in their questions and answers, than if it were taken for granted that what they did not wish to appear, might, with a little persuasion of the committee, be obliterated. Witnesses may be deservedly indicted for perjury,§ in respect of the very answers which may have been expunged from the notes: and it would be obviously more satisfactory

* Elect. Pet. Act, 1848, s. 82.

† Simmons on the Practice of Courts-Martial, p. 224, 4th ed. (1852.)

‡ Elect. Pet. Act, 1848, s. 87.

§ Id. s. 85.

to all parties to find an exact correspondence between the original notes of the short-hand writer, and the printed minutes on which the House of Commons acted, in ordering a prosecution. In the *Leicester** case, [A.D. 1848], counsel objected to the course of examination which was being carried on, and applied to have the answer just given expunged from the minutes; but after argument and deliberation, the committee "resolved that the last question and answer be allowed to remain." So in the *Kidderminster* case [A.D. 1848],† the committee, finding that the question asked related to an Inn not included in the list of treating, resolved that "the question be struck off the minutes." So in the *Bodmin* case,‡ [A.D. 1848], a question was expunged on the same grounds as in the *Leicester* case.

It ought not, however, to be expected that the notes should be loaded with inadvertent and irrelevant matter, nor ought there to be any occasion for its being done; and it would render even the committee itself all the more watchful, if aware that what was once recorded on so serious an occasion, must stand, as a record of negligence, or indiscretion on their part, or that of counsel.

The names of counsel and agents are handed in to the committee; and it is necessary to be very careful in including the names of those agents whom it is intended to call as witnesses, under the seventh preliminary resolution.§

The petition is then read, and the committee determine on the order in which, if there may be more than one, they are to be taken.

By the 46th section of the Election Petitions Act, 1848, it is enacted that *all* election petitions received by the House shall be referred to the general committee; and that after having been reported on by the Examiner of Recognizances that the recognizances are unexceptionable, a list of the petitions is to be made out by the general committee, arranged in the order in which they were so reported on. By the forty-eighth section, where there are more than one relating to the same election, the general committee must suspend their proceedings in respect of them, till they have been reported on by the examiner; when they are to be placed at the bottom of the list, bracketed together, and "afterwards dealt with *as one petition*"—that is, referred to one and the same select committee. The order in which the select com-

* Print. Min. pp. 114, 115.

† P. R. & D. 265.

‡ Id. 134.

§ For the discussions which may arise on these points, see the *Horsham* case, 21st August, 1848.—Print. Min. 173—175.

mittee will take the petitions may be the subject of agreement between the parties; but in strictness, that which was first presented to the House, and "appears first on the Journals," is to be taken first. This was the course taken "without there being any objection," in the *Aylesbury* case [A.D. 1848]; * when two petitions were presented, respectively by electors, against each of the two sitting members. When two petitions are presented to the House on the same day, they will be read by the committee in the order in which they stand in *the Journals*, not in the *Votes*, which may be erroneous. When such is the case, the mistake is set right in the Journal, under the direction of the Speaker and the Chief Clerk. The notes are often made up hastily and in confusion, but the Journal appears at weekly intervals, and is made up with great care.† Here it may be observed, that before the year 1828, electors who had voted *for the sitting member* had no means of becoming direct parties to the petition; and if he, for any reason creditable or discreditable, withdrew from the inquiry, they were left undefended. In the year 1828, this defect was remedied by statute 9 Geo. 4, c. 22, ss. 10, 12; and now by the 19th section of the Election Petitions Act 1848, any elector may be admitted to defend the return or oppose the prayer of the petition, in the room of, or "as a *party, together with the sitting member.*"

There may, of course, be any number of petitions in respect of the same election, or against the same individual member, all of which, provided the recognizances be unobjectionable, will be referred to the same select committee, who will determine the order in which they are to be taken; but it becomes a very different question how counsel are to be heard in respect of such petitions; and it is conceived that this is a matter entirely within the discretion of the select committee. If the petitioners and their cases be distinct from each other, they must be taken, if required, separately, with the practical incidents of such separation, —namely, each being treated as if it were the only case before the committee; but if the cases of more than one be really in substance and in interest identical, arrangements would be made to avoid the serious inconvenience of separate examinations of witnesses, summings up, and replies.

* Print. Min. 1.

† In the *Warwick* case, Per. & K. 536 (1833), the Clerk of the Journals was called, and stated that the Journal is published about a week after the day to which the entry relates; and that there is always a copy lying in his office, which is a public one, to which the public have access; and another in the library; and another is given to the Speaker; and that he publishes a list, which he gives to any one who applies to him, and on that the petitions stand in the same order as in the Journals.

In the case of a double return, and the two or more members returned contesting it, then, according to the Resolutions of the House, of the 18th March, 1727—8, “the counsel for such person who shall be *first named* in such double return, or whose return shall be immediately annexed to the writ or precept, shall proceed in the first place.”*

The petition having been read by the clerk, the time has arrived for making all legal objections to it; and, first, those which are extrinsic to the petition. If any fraud or irregularity have been used in presenting it, such may be alleged, inquired into, and decided, before the committee enter into evidence as to *the matter contained in the petition*. Thus, in the second *Canterbury* case [A.D. 1797] † one set of petitioners convicted the other of having got up their petition by collusion with the sitting member: on which the committee resolved, “that the fraud alleged against the petitioners A. and B. has been proved. That the said petition be not heard.”

A petitioner in any case, by becoming such, renders his whole conduct, with regard to the election, amenable to inquiry, in order to the discovery of objections which would defeat the petition; and in the case of a candidate, with the further view, also, of showing him to be incapacitated in the event of a re-election.‡ If there be a ground for suspecting that there have been any malpractices, or that the signatures to the petition are not authenticated, or that they have been procured by improper means, or that there has been fraud or improper contrivance in setting on foot the petition, that fact will be inquired into in the first instance.§ However sufficient the petition may be upon the face of it, it is competent to the opposing party to go into evidence to show that the petition is not within the description contemplated by the statute; and the objection, if established, will be decisive as far as regards such petition.||

There are two modern cases on this subject. The first is that of *Sligo*, [A.D. 1838] ¶ in which, but only at the close of the petition, and after the committee had given their decision in favour of the sitting member, they were applied to on his behalf to declare the petition frivolous and vexatious, on the ground that it had been got up by

* The course to be adopted when one of the parties to a double return declines to defend his return, is prescribed by the Election Petitions Act, 1848, s. 21.

† Clifford, 361; Orme on Elect. 365.

‡ 2 Roe, 111.

§ Id. p. 112.

|| Id. pp. 118, 119.

¶ F. & F. 564.

strangers to the borough, for the express purpose of harassing the sitting member; and that they had created a fund called "The Spottiswood Subscription, or Irish Election Petition Fund," to set that petition on foot. It was answered by the counsel for the petitioners "that it was not within the jurisdiction of the committee to inquire whence the funds came, with which the petition is prosecuted. It is not among the matters and things submitted to its investigation." The committee resolved that the sitting member should not be allowed to prove the origin of the funds till he had *given evidence to impugn the boná fide character of the petition.*" On the ensuing day the sitting member's counsel declared himself unable to do so; and the petition was voted *not* frivolous and vexatious.

This case, and those cited in text, were urged on the *Lyme Regis* [A.D. 1848]* Committee, on the fifteenth day of the inquiry,† when it appeared on the cross-examination of a witness, that the expenses of the petition were paid by a third person. The counsel for the sitting member therefore applied to the committee to stay all further proceedings in the matter of that petition: that it was not *boná fide* that of the petitioners, but of a third party, and was in violation of the law against maintenance. It was answered, that admitting the fact of another person having agreed to bear the expense of the petition, that did not destroy the *boná fide* character and position of the petitioners. Their interest was preserved: it did not matter who paid the costs of the petition. If petitioners were obliged to pay the costs, inquiries would be stopped, and corruption go unpunished. On a subsequent day, the committee Resolved, "after serious deliberation on the corrupt relation between" the third person in question, "and certain of the voters, and having ascertained that he was virtually the petitioner in the case, they had considered the propriety of stopping the further progress of it; but that under the existing law, they have no such power." No reasons were given for the conclusion at which the committee had arrived; but it does not really impugn the principle laid down in the text.

The various intrinsic objections which may be taken to a petition, have been discussed at length in previous chapters, and various recent decisions of select committees will be there found.‡ In the *Aylesbury* case [A.D. 1848], as soon as counsel had assented to the order in which the two petitions were to be taken, it was formally objected that the sole petitioner in that which had been selected, had had no right to vote at the

* P. R. & D. 35.

† Print. Min. 343.

‡ Ante, Ch. XVI. p. 301, *et seq.*; Ch. XVIII. pp. 332—340.

election; and that consequently the petition could not be heard. Evidence was then called, and the point was argued by the direction of the committee, "as a preliminary objection." The committee ultimately decided that the voter had established his right to petition, and resolved "that the case must proceed."*

Whatever legal ground there may then exist for applying for an adjournment, may at this point be urged on the committee; who considering, however, the heavy additional expense entailed by such a procedure, are slow to grant it, and may make pecuniary terms on the part of the applicant conceding a condition of it. In the *St. Alban's* case† [A.D. 1851], the counsel for the petitioners, as soon as the committee had overruled the preliminary objections which had been made to the efficacy of the petition mentioned in a previous chapter,‡ applied for an adjournment on the ground that certain material and necessary witnesses for establishing the case of the petitioners, had, either to avoid being served, or after having been served, to avoid giving evidence, disappeared—some of them having been carried off by agents of the sitting member. Proof of these facts having been given, the committee adjourned; and two subsequent adjournments on the same ground occurred, before the petitioner's counsel stated the case of the petitioners.§

All preliminary points having been disposed of, and the *locus standi* of the various parties established, the next step is, for the petitioner's counsel to OPEN the matter of the petition. For this purpose, it is necessary that he should have been furnished, and in time, with accurate and ample instructions; for the first of the preliminary resolutions precludes him from giving any evidence of matters not referred to in his opening speech, without a special application for permission to do so. That special permission a committee is very slow to give, and only on the strongest grounds. In the *Southampton* case|| [A.D. 1842] the counsel for the petitioners endeavoured to induce the committee to allow a case of bribery to be proved, which had not come to their knowledge till after the opening speech had been made; but the committee refused: for it was not, within the terms of their resolution, a case "the knowledge of which had been brought out before the committee in the progress of the investigation."

The OPENING SPEECH gives a general outline of the entire case, merely, however, indicating the fact of there being a scrutiny prayed

* Print. Min. pp. 1, 2.

† Id. p. 12, *et seq.*

‡ Vide ante, Ch. XVI. p. 322.

§ Print. Min. p. 29.

|| B. & Aust. 400.

for, inasmuch as the statutory lists delivered in beforehand to the general committee, and by them referred, with the petition, to the select committee,* give distinct notice of every specific objection to every voter, for the information of the committee, and of all parties. It is only in cases of bribery and imputed corruption, that in each instance must be specified the names of both parties to the bribe; alike whether the proof be aimed at the sitting member or his agents, or whether the object of the petition be to render the election null and void on the ground of general corruption † It is not absolutely necessary to open any particular case of bribery at all.‡ The usual course, however is to do so, and also to hand in a list of the parties bribed and bribing: the object of which is, in the language of the chairman of the Derby election § [A. D. 1848], “that every person who is charged with being bribed should know distinctly who is charged with bribing him—first, as far as the committee itself is concerned; secondly, practically, to save expense.” In that case, after the name of the first elector bribed, instead of that of the actual individual briber, there were the names of forty-two persons as the alleged bribers. It was contended, on the part of the petitioners, that this was sufficient, because the money was asserted to have been paid *at a committee-room*; and as the petitioners could not tell exactly who had given the money, they had inserted the names of the whole committee. But this being objected to as not sufficiently specific, the petitioners were ready to lessen the number to *five*. The counsel for the sitting members replied that the reduction lessened, but did not remove the objection; and said that he would admit the list to be good, where it could be shown that the bribe was the act of the committee; but that, for any act of *an individual*, the list was no notice at all. The chairman said that the committee had had very great difficulty upon the point; that, having taken the whole matter into consideration, and bearing in mind that five names had been mentioned in the opening speech, and as probably those gentlemen were present, there would not be any practical difficulty in allowing the petitioners to retain those names; but that if, by the next day of meeting, they could amend the list, by inserting the names of those who were supposed to have been the actual bribers in each case, it would be more consonant with their

* Ante, p. 324.

† *Great Marlow*, B. & Aust. 11; *Sudbury*, id. 242; Rog. on Elect. Com. 64, 65.

‡ Arg. *Harwich* (2nd), P. R. & D. 317.

§ Print. Min. 2.

opinion of what the resolution had laid down. On the ensuing day it was stated by the counsel for the petitioners, that they had amended the lists in conformity with the suggestion of the committee; that in many cases the names of the five selected persons, or most of them, appeared; that, in others, *other* names appeared in conjunction with *one of the five* names; and that they had added such *other* names, wherever it appeared that they had taken the preliminary steps towards giving the bribe. The sitting members' counsel objected to these additional names, and the committee ultimately restricted the petitioners to the five names which had been already given in.

In the *Lincoln* case* [A.D. 1848], one Talker was alleged to have been bribed by "*Whelpton and Keeley, and others unknown.*" It was attempted to prove that a person named *Gresham* had bribed him, but the committee refused to allow it, as the name of *Gresham* was not in the lists handed in to the committee.

In the *Second Hurwich*† [A.D. 1851], the lists did not state time or place; and it was also urged that all the cases of bribery ought to have been opened. The committee held that the list satisfied the requirements of the resolution, but that it would be convenient for counsel to state the cases in which they meant to proceed, and that the committee would consider the remainder, if any, withdrawn from the lists.‡ It will be observed that the resolution concerning bribery does not require more than the names of the bribers to be stated; but that relating to treating requires both time and place. Notwithstanding this, however, in the *Bodmin* case§ [A.D. 1848], the committee, on the objection being taken that the *time* was not mentioned, held that the list was *sufficient*. It is not easy to understand from the minutes, on what ground this decision rests.

In the same case, an application was made for leave to make additions to the list of places and times at which the treating took place; but the committee refused it, the opening speech not having referred to any but the public-houses mentioned in the lists which had been delivered in.||

In the *Carlisle* case¶ [A.D. 1848], if the name of the owner of the house where the treating took place was omitted, the committee refused to allow the case to be gone into.

* P. R. & D. 77.

† Id. 317.

‡ A list containing five names was handed in the next morning.

§ P. R. & D. 133.

|| Id. 134, 135; S. P. *Kidderminster* [A.D. 1848], P. R. & D. 265.

¶ Print. Min. p. 51.

In the *Aylesbury* case* [A.D. 1848], the committee allowed an amendment to be made in the name of the *sign* of the public-house where the treating took place, "regarding it as a clerical error."

These cases suffice to show the mode in which committees deal with their own resolutions concerning bribery and treating, and the lists respecting them which are delivered in, not by virtue of any statutory enactment, but by the course and practice of committees. It is only reasonable to expect that those who come prepared to contest the validity of an election return, should be in a position to give accurate information as to the details of such essential parts of their case—*details without which* they should not have determined on, or at least presented, their petition. Laxity in this instance would lead to the most mischievous results; and of this committees are aware, and act accordingly.

The next step, after the opening speech, is to *put in the poll-books*, about which there now rarely can arise any difficulty. This matter was fully explained in the preceding chapter.†

In the conduct and arrangement of their case, committees generally rely on the discretion of counsel, who usually proceed at once to those parts of their case which lead to the avoidance of the election. Committees, however, will go so far as to order this course to be taken, even without the consent of the sitting member. If, indeed, the petitioner have the ordinary right of a plaintiff to conduct his case in what order he pleases, and the committee approve of the course which he has selected, the sitting member can have no just cause for complaint. Thus, in the *Athlone* and *Totness* cases‡ [A.D. 1844], overruling the objection of the sitting members, the committee allowed the question of the irregularity of the election to be entered into in the first instance; and in both instances the elections were declared void, without the other parts of the case being entered into.

In the *Coventry* case§ [A.D. 1833], each of the two grounds of objection—want of qualification and riot—led to a void election. The petitioner having opened his whole case, the sitting member applied to have the question of the qualification first disposed of, to save time and expense; but the committee directed the petition to proceed first on the general charge of riot.

In the *Lincoln* case|| [A.D. 1833], want of qualification was the only

* Print. Min. 105.

† Ante, p. 623.

‡ Barr. & Arnold, 117, 118, 124; Rog. on Elect. 67.

§ P. & K. 345; Rog. on El. Com. 67.

|| P. & K. 378.

charge in the petition ; and the petitioner wished to rest his case, in the first instance, on the insufficiency of the sitting member's own particular, reserving to himself the right of establishing his objections on another ground, should it be necessary ; but the committee required him to go through his whole case at once.*

In the *Lyme Regis* case† [A.D. 1848], the petition alleged bribery and treating, and also prayed a scrutiny. The petitioner's counsel proposed to enter on the scrutiny first, as, in the event of his placing the sitting member in a minority, it would be unnecessary to enter upon the general case of bribery. The committee, however, resolved, "That where there is a charge of bribery against the sitting member or his agents, it ought to be gone into first, and not reserved until after a scrutiny." In this case, the chairman proceeded to state what he considered to be peculiar and pressing reasons, arising out of the report of an election committee for the same borough in the year 1842, for "pushing to the utmost the inquiry into the alleged cases of bribery." The petitioner's counsel then endeavoured to induce the committee to take the bribery cases which formed the subject of scrutiny.‡ The chairman, however (the present Earl of Shaftesbury), stated—"That the object of the committee was to go into those cases which directly implicated the sitting member ; and if the petitioners proved their case of bribery, the committee would instantly go into the case of bribery on the other side : that they should not enter upon the scrutiny until the case of bribery had been disposed of *on both sides*."§ Having concluded the three cases of bribery to which they confined their charge, the petitioner's counsel was about to sum up the evidence, when the sitting member's counsel required him first to proceed with the treating cases, as a part of the general case ; and on the petitioner's counsel stating that they had not anticipated being required to proceed with the treating cases till those of bribery on both sides had been concluded, the committee resolved that he should proceed with the treating cases, for "That bribery and treating were so allied in their nature and spirit, that the investigation of the one ought to be inseparably connected with that of the other ; and that the counsel must proceed at once with the treating cases, or give them up." On this the petitioner abandoned the treating cases.

On the other hand, in the *Harwich*|| (1st) [A.D. 1851], on the committee deciding against the sitting member on the question of qualification, the petitioner's counsel proposed to proceed with the

* Acc. *Dover*, P. & K. 417, *in notâ*.

† P. R. & D. 26.

‡ Ante, pp. 374, *et seq.*

§ P. R. & D. 28.

|| Id. 300.

scrutiny. The sitting member's counsel required that he should first either enter upon or abandon the case of bribery against the sitting member; but the committee resolved that the petitioner should *proceed with the scrutiny*.

In the *Dublin* case* [A.D. 1848], the petitioner was allowed, notwithstanding the protest of the sitting member, to enter on the scrutiny, before the question of qualification, the committee declining to interfere with the discretion of counsel.

In the *Leicester* case† [A.D. 1848], the committee said that it was better to *conclude* the evidence of bribery before raising that of treating.

In the *Bodmin*‡ case [A. D. 1848], on the petitioner concluding his case of bribery and treating, the committee resolved that the case of *bribery* had not been proved, and directed the sitting members to confine their answer to the charges of agency and treating, the committee postponing the question of costs as to the charge of bribery, till the whole case had been concluded.

In the *Harwich*§ [A. D. 1851—second case] the petitioner complained of an unlawful closing of the poll, and prayed a scrutiny. The sitting member's counsel objected to the petitioner closing his case on the allegation of the unlawful closing of the poll, before proceeding with a scrutiny; but the committee resolved, that the petitioner "should close his case with the first allegation of the petition—the premature and unlawful closing of the poll"—as it would, if decided in his favour, at once terminate the inquiry.

The course of procedure on a scrutiny, when it has been entered upon, is now pretty well settled.

It is seldom that the carefully prepared "lists" are defective, either generally, or as to particular names.

Each case is, to all intents and purposes, one by itself, and as such to be commenced, continued, and concluded, in respect of examination, cross-examination, and re-examination of witnesses, opening speech, and reply. Only one counsel is to be heard in each, to argue, open, or sum up. A vote once disposed of, is not to be assailed again, however many other objections there may be to it; and the examination of witnesses is to be confined to the particular vote under consideration, without any attempt to extract evidence applicable to any other vote, or part of the case. One class of objections must be exhausted before another can be entered upon; the remaining cases in the class which has been entered upon, must be proceeded with or

* P. R. & D. 193.

† P. R. & D. 135.

‡ Print. Min. 134.

§ P. R. & D. 317.

withdrawn. If a particular decision take counsel by surprise, and the committee believe that such a statement is made with reason, they may allow a vote, or the proceedings generally, to be adjourned for a short time.

Also if an objection be taken to an instrument that it is not stamped, if it be insisted on, the committee will adjourn the case to allow of a stamp being obtained. This they did recently.

Subject to these rules, it may be added, that the entire of a case, or of any particular branch of it, selected at the instance of the committee, or by the agreement of counsel, must be exhausted, before the opponent is called upon for his answer. To hear a case, or series of cases, by piecemeal, so to speak, would manifestly lead to endless confusion. Nor will the committee intimate, at the request of counsel, at the close of a case, their opinion on any particular part of it, but leave him to exercise his own discretion as to the course to be pursued.*

Questions have sometimes arisen as to the respective rights of several opponents to a petition, to which some reference was made in a previous portion of this chapter.

In a court of law, where there are several defendants, who appear by separate attornies, if their defences *be distinct* from each other, the counsel of each has a right to address the jury and examine the witnesses. If, however, they all rely on the same defence, only one counsel can address the jury, and only one examine witnesses on the part of all the defendants, in the same manner as if they had appeared and defended jointly.† In the case referred to below, and in which this rule was laid down by Chief Justice Gibbs, he said,—“This is a rule I received from a judge of whom no one can speak without respect, and almost reverence: I mean, my very learned and excellent predecessor Chief Justice Mansfield.” In the recent case of *Nicholson v. Brooke*,‡ the Court of Exchequer adopted this rule, expressing their opinion, that where several defendants appear by several counsel, it is a matter of discretion for the presiding judge, whether he will allow more than one counsel to be heard.

The same principles are applicable to cases before the select committee. If there were to be six sets of petitioners against the same sitting member, and if their cases were substantially identical, it could

* *Horsham* (Second), P. R. & D. 255 [A.D. 1848].

† *Chippendale v. Masser*, 4 Camp. 174.

‡ 2 Exch. Rep. 214.

not be tolerated that the case should be tried six times. If, however, there be several parties, and their cases really distinct, they have an unquestionable right to be dealt with distinctly and independently.

In the *Bodmin** case [A. D. 1848] there was one petitioner, the unsuccessful candidate, against the two sitting members, on the ground of bribery and treating; as against one, want of qualification; and praying a scrutiny—which, however, was abandoned. The evidence was confined to the case of bribery and treating. The sitting members severed in their defences, and one only proposed to call evidence; on which the counsel of the other urged the committee to come to a decision on his case, as soon as his counsel should have addressed the committee. They declared, however, that before they came to any decision, they would hear the whole case against both. Ultimately both called witnesses; the counsel of both addressed the committee; the counsel for the petitioner replied on the whole case; and the committee declared both the sitting members duly elected.

If the sitting member withdraw from the contest, the petitioner must still establish his majority;† but a petitioner will not be permitted to proceed further in his scrutiny than is absolutely necessary to seat him.‡ When a petitioner has placed himself in a majority, the committee will allow him to proceed with the scrutiny, and will not compel him to go then into a charge of bribery and treating against the sitting member.§ And, although the latter be disqualified by a resolution of the committee, he will still be allowed to proceed with the scrutiny, to attack the votes of the petitioner.||

Although the parties concerned may admit the facts necessary to warrant the committee in declaring the election void, they properly require these facts to be established by evidence, as the only proper ground of their report to the House. Thus, in the *Carlisle*¶ case [A. D. 1848], the agent of the sitting member having written a letter giving notice of not intending to defend his seat, the committee nevertheless required *evidence* of the fact alleged by the petitioner, namely, that he was interested in a contract to supply the Ordnance department with coal. And again, in the *Horsham* (first) case** [A. D. 1848],

* P. R. & D. 135, 136.

† *Longford*, P. & K. 201 [A. D. 1833]; *Mallow*, id. p. 266 [A. D. 1833].

‡ *Monaghan*, K. & O. 43; id. *Carlow*, 471 [A. D. 1848].

§ *Harwich* (1st) [A. D. 1851], P. R. & D. 311.

|| Id. 312. And see (acc.) *Evesham*, F. & F. 531 [A. D. 1837].

¶ P. R. & D. 60.

** Id. 108.

though treating was admitted by the sitting member, the committee announced that they would require "evidence of the fact by witnesses, as a ground for their resolution."

Almost all petitions now are directed against both the election and the return; but, formerly, many were presented against the return alone. "If one be duly elected knight, citizen, or burgess," says Lord Coke, "and the sheriff return another, the return must be reformed and amended, and he that is duly elected must be inserted; for THE ELECTION IS THE FOUNDATION, and not the return."* Much contrariety of decision will be found in the Election Reports and Treatises, as to when the return was to be considered apart from the merits of the election. "The principle" says Mr. Rogers, "seems to be this:—If the return vary from the poll, or if, by mistake or misconduct, the poll has been so altered as to produce an alteration in the result of the election, so that the return, adopting an incorrect poll, does not, in fact, truly state the result of the election;—the return, in the first place, should be amended, so as to correspond with the poll; and, in the second place, the poll should be corrected, and the return made to conform to it.† If, on the mistake in the return being rectified, the petitioner appear in a majority, leave may be obtained for the unseated member to question, within four days, the merits of the election; which he may, as he did in a case mentioned in a former chapter, prove to be in his favour, and secure his name being reinserted in the return.‡

With reference to petitions from IRELAND, it is to be observed, that if a select committee shall be of opinion, from the nature of the case, and the number of witnesses to be examined, that the petition cannot be effectually inquired into without great inconvenience and expense, they may make an order for the nomination and appointment of commissioners "*at any period during the course of the proceedings.*"§ The statute referred to below, was passed in the year 1802; since which time its powers have been but seldom, and that not very satisfactorily, called into action. Steamboats, railroads, and the electric telegraph,|| are likely to render a resort to this statute still less frequent.

* 4th Inst. 49.

† Law and Pr. of Elect. Com. 68, n. (a).

‡ Ante, pp. 310, 311, Ch. XVI.

§ Stat. 42 Geo. 3, c. 106, s. 4.

|| In the *Horsham* (second) case (A.D. 1848), the Attorney-General being required as a witness, was found to be absent, professionally engaged at Liverpool; on which the chairman assented to arrangements being made for his examination on a future day, adding, "and the committee will communicate with the Attorney-General by electric telegraph, requesting his attendance to-morrow." P. R. & D. 255.

CHAPTER XXVII.

COSTS.

OF this inviting subject a prospective glimpse was afforded in a previous chapter,* in order, as it was said, that intending petitioners might "be induced to consider in the first instance, the nature and extent of the pecuniary liabilities which they are about to incur." It is now, however, necessary to examine that subject closely, in order to determine the relation to it, of those who have voluntarily and advisedly entered into such liabilities. Repentance is then too late; and it would be equally unreasonable and scandalous to meet just claims in a captious and paltry spirit, unworthy of those who have been engaged in so great a venture, and had eagerly availed themselves of the services of experienced and able professional advisers.

Victus victori in expensis condemnandus est, was the maxim of the civil law;† but it was not till the year 1277-8, that the law of England had learned to cry "*væ victis*." In that year the legislature first gave costs of suit to the successful party, by the statute of Gloucester.‡ "Before this statute," says Lord Coke,§ "at the common law, no man recovered any costs of suit. By this it may be collected that justice was good cheap of auncient times; for in King Alfred's time there were no writs of grace, but all writs remedial were granted freely." While costs at law are thus the creatures of statute, it is not quite so with costs parliamentary. So long ago as the year 1624, the committee of privileges in the *Gloucestershire* case,|| directed that the petitioner "*do pay costs*;" but they added, in reporting to the House, that "they cast off that consideration, if the petitioner no further pressed the matter." This case is reported by Glanville, and has been cited elsewhere¶ as authority for the proposition recognized and acted

* Chap. XV. pp. 298, 299. "Security for Costs and Expenses," p. 290.

† Cod. iii. l. 13.

‡ 6 Ed. 1, c. 1.

§ 2 Inst. 288.

|| 1 Journ. 751.

¶ Ante, p. 399.

upon in that case, that a man may be elected and returned, and must serve against his will ; and Mr. Rogers well remarks, that the silence of so experienced a parliamentary lawyer, as to the regulation concerning costs, while carefully reporting the others, may safely be considered evidence that the infliction of costs was then no innovation. The next recorded case, that of Southwark,* occurred after an interval of seventy-one years, viz., in 1695, when the committee of privileges gave their opinion, that the petition of Sir George Meggott “ was *vexatious, frivolous, and groundless* ;” the House resolved that he “ do make satisfaction to the members of this House he petitioned against, for the *costs and expenses* they have been put unto by reason of such petition.” For having preferred such a petition, and “ also having scandalized this House by declaring that, *without being duly chosen, he had friends enough in this House to bring him into the House*,” it was also resolved “ that he be taken into the custody of the serjeant-at-arms attending this House.” There are other instances of petitions being declared frivolous and vexatious, and similarly dealt with, down to the 13th February, 1700, when was first passed the following general resolution† of the House, renewed afterwards annually : “ Resolved, that where *this House* shall judge any petition touching elections to be frivolous *and* vexatious, the House will order satisfaction to be made to the person petitioned against.” We are thus justified in saying, that though perhaps not frequently exercised, the power of giving costs, with a view to protect its members in cases of groundless petitions, seems to have been coeval with the earliest exercise of the jurisdiction of the House of Commons over elections and returns.‡

The resolution of 1700 continued to be the only provision for parliamentary costs, till the year 1788, when the legislature, for the first time, interposed with enactments which have been the basis of all ensuing ones on the subject. Three years previously the learned Mr. Luders, in the preface to his Election Reports, stated, that if a committee should determine a petition to be frivolous or vexatious, they could not redress the party grieved, otherwise than by the troublesome and uncertain means of a report to the House—thereby indirectly re-opening the examination of election proceedings before the House at large : and he added, ‘ it seems to me, that the committee itself would exercise the power of awarding costs to the party grieved, with more regularity and satisfaction.’§ The Grenville Act, in the

* Journ. xii. 371, col. 1, 27th December, 1695 ; 1 Douglas, 165.

† Journ. xiii. p. 326, col. 2 ; 327, col. 1.

‡ Rog. on Elect. Com. 236.

§ 1 Luders, Pref. xxii., xxiii.

year 1770, had made no allusion to the matter: but eighteen years afterwards was passed the statute above referred to, the 28 Geo. 3, c. 52; reciting, *inter alia*, that it was expedient that provision should be made for discouraging persons from presenting frivolous or vexatious PETITIONS, or setting up frivolous or vexatious DEFENCES," touching elections and returns to serve in parliament. The 5th section prescribed a recognizance to appear before the House on the petition, entered into by the subscribers of the petition, in the sum of 200*l.*, with two sureties in the sum of 100*l.* each. The 18th, 19th, 20th, and 21st section, then provided that the select committee should accompany their final determination with a report to the House, "whether the petition, or the opposition to it, had appeared frivolous or vexatious:" or if no opponent had appeared, whether the election or return, or omission to make a return, or an insufficient return, had appeared vexatious or corrupt:—and if their report were in the affirmative, it entitled the parties aggrieved by such conduct, to "the FULL COSTS AND EXPENSES incurred by them" respectively. The act then appointed the persons who were to ascertain the costs and expenses, and gave an action of debt to recover the amount, if not paid when demanded, on the production of the Speaker's certificate.

This statute seems to have been carried into effect rather rigorously. In the year 1792, in the *Bodmin* case,* a petition was presented against a return, under the advice of counsel, that a mere *de jure* mayor could not be a good returning officer;† and though the counsel himself, on behalf of the petitioners, stated that he had given that opinion, though he now thought differently; and that the petitioners had desisted the moment they found out their error in point of law, he had the mortification of hearing the committee report the petition frivolous and vexatious. So, again, where the evidence adduced in support of the petition was held inadmissible, a like fate followed:‡ but where, five material witnesses having died, of which timely notice had been given, the petition could not proceed, the committee, mercifully acting on the maxim *actus Dei nemini facit injuriam*, determined the petition to be *not* frivolous or vexatious.§

On this footing stood matters till the year 1828, when the above act, with others, was repealed by statute 9 Geo. 4, c. 22, which consolidated and amended the laws relating to the trial of controverted elections; by sections 40, 57, 58, 59, 60—65, substantially re-enacting the provisions as to costs, of statute 28 Geo. 3, c. 52. Both these acts

* 2 Fraser, 236.

‡ Sutherland, 2 Fraser, 157.

† Ante, p. 387.

§ Honiton, 2 Fraser, 246.

made it *imperative* on committees to report to the House whether or not the petition, opposition, or the return, or insufficiency or omission of a return, had been frivolous or vexatious; the words of both acts being, with reference to all such cases—"every such committee SHALL also report to the House WHETHER such petition DID OR DID NOT appear to them to be frivolous or vexatious." In conformity with this requirement, from the year 1828 to 1844, committees used, "at the same time that they informed the House of their final determination on the merits of the petition," to report according to the fact—"that neither the petition, nor the opposition to it, was frivolous or vexatious." In the year 1844, however, this practice was altered by statute 7 & 8 Vict. c. 103, ss. 88—92, which are identical with ss. 89—93 of the Election Petitions Act, 1848. Now, "WHENEVER any committee REPORTS to the House that such petition," opposition, &c., "WAS FRIVOLOUS OR VEXATIOUS," the petitioners or opponents, as the case may be, "shall be ENTITLED to RECOVER, from " the parties against whom such report is made, "the FULL COSTS AND EXPENSES incurred in *opposing or prosecuting* the said petition." Where, therefore, the committee does not intend to visit any party with costs, their report is simply silent.* When they do so intend, their report specifies, in terms of the statute, whether the petition, or the opposition to it, was frivolous or vexatious; or whether the election, or the return, or omission, or insufficiency of a return, was vexatious or corrupt, or an objection to a voter was frivolous or vexatious; or an allegation with regard to the conduct of the opposite party or his agents of which no evidence is brought, or such as shows the allegation to have been made "without any reasonable or probable ground."

Of the manner in which this power is exercised, the report of the committee in the *Rye†* case [A.D. 1848] affords an illustration. There the petition was mainly against the validity of an election, which the committee, as it has been attempted to show in a previous chapter, avoided erroneously. The counsel for the petitioner restricted his case to this point, abandoning the charges of bribery and treating. On this the sitting member's counsel *gave evidence* to show that these allegations were utterly unfounded; that there had been no contest; the sitting member had taken no part whatever in the election; had had neither canvass nor agents, there having been a spontaneous movement among all parties in his favour; and that but for these charges, he would at once have abandoned the defence of his seat. It

* Ante, p. 299, Chap. XV.

† P. R. & D. 116, 117.

was attempted by the petitioner to excuse himself from liability to costs, by showing that, up to the time of coming before the committee, there had been no known agent of the sitting member to whom notice might have been given of the abandonment of the charges of bribery and treating. The futility of this suggestion, however, is obvious from the consideration that all needful inquiries and notice might easily have been made of, or given to, the sitting member. On this the committee resolved, first, that the sitting member was not duly elected; secondly, that the election was void.

“Thirdly, that inasmuch as in the petition there are certain specific allegations of bribery and treating on the part of the sitting member and his agents, in proof of which no evidence was offered to the committee, the committee are of opinion that such allegations are unfounded, and were made without any reasonable or probable ground, [and are frivolous and vexatious].

“Fourthly, that the committee have thereupon ordered that all costs and expenses of and relating to the said allegations shall be [forthwith] paid by the petitioners, and their surety, to the said sitting member.”*

It now remains to consider in what cases costs become recoverable; and secondly, what is the mode of ascertaining their amount, and enforcing payment of them.

I. It has lately been suggested that the costs of election proceedings ought, as a general rule, to follow the event, as in the case of proceedings in the courts of law and equity. To this, however, there may be assigned grave objections. Except in specified cases, costs are not recoverable in criminal proceedings, which have terminated in acquittals, even where those proceedings were wholly unfounded, frivolous and vexatious; but the aggrieved party is left to his civil remedy by an action for a malicious prosecution. The fact, however, that the defendant had had recourse to legal proceedings, raises a *prima facie* inference *in his favour*, which the plaintiff is bound to rebut by proving the absence of all reasonable and probable cause, which is to be decided exclusively by the judge; the jury finding only, whether the facts alleged in support of the probability exist, and the presence of

* The words in brackets seem not justified by the act then or now in force. The committee had no power to order the costs to be paid *forthwith*; the statute (7 & 8 Vict. c. 103, s. 92) expressly stating that the costs and expenses should be ascertained and recovered in the same manner and form as were provided in case of frivolous and vexatious petitions. The Guildford Committee (7th March, 1853) inflicted costs on the petitioners, on the same grounds, and also ordered payment of those costs “*forthwith*.”

an actual malicious intent.* If, indeed, in every instance of a criminal prosecution, the prosecutor were to be liable to costs in the case of an acquittal, crime, in innumerable instances, would escape with absolute impunity, especially where the sufferers by it were members of the humbler classes of society.

Thus, also, it is in the case of parliamentary proceedings. If no one dared to question the legality of an election, except at the serious risk of having to pay all his opponent's costs in the event of failure on *any* ground, the consequences would be destructive, indeed, of the public interests; and wealth and corruption united, would be in almost every case triumphant and unassailable. If, however, on public grounds, due latitude be left to the *bonâ fide* challenging of all or any of the proceedings at an election, as is now the case, that very latitude operates *in terrorem* of evil doers, who know the inducements which exist for a free and fearless scrutiny of the conduct and doings of all parties to an election. In strict conformity, therefore, with reason, and the public interests, and with both the letter and spirit of the constitution and law of this country, no one shall pay his successful adversary the costs of an inquiry into the propriety of proceedings at, or in respect of, a parliamentary proceeding. That is the rule; but the well defined exception to it is, that if the tribunal, necessarily possessed of the best means of ascertaining the real motives and objects of all parties, judged by their conduct with reference to facts disclosed before itself, shall be of opinion that the promoters of the proceedings have acted *frivolously, vexatiously, corruptly*, and without *any reasonable or probable ground*,—then that tribunal shall declare their judgment in the matter, and thereby entitle those aggrieved by such misconduct, to THE FULL COSTS AND EXPENSES incurred in consequence of it. Than this, nothing can be more politic or equitable.

What *constitutes* frivolous, vexatious, or corrupt conduct, and the want of reasonable or probable ground, is altogether a matter of discretion† with the committee. As to petitioners and their opponents, sitting members giving no notice of not defending their seats, and those parties admitted to defend the election or return, the act says nothing (ss. 89—91), except that, “whenever the committee reports ‘frivolous, vexatious, or corrupt conduct,’ the designated consequences shall follow.” In the case of frivolous or vexatious *objections to voters*, and

* *Panton v. Williams*, 2 Q. B. 192; *Mitchell v. Jenkins*, 5 B. & Ad. 588; *Porter v. Weston*, 5 Bing. N. C. 715. The jury *may* infer malice in fact, from the want of probable cause, but are not *bound* to do so. *Johnston v. Sutton*, 1 T. R. 545.

† Ante, pp. 299, 300.

allegations *against parties or their agents*, without reasonable or probable ground, if the committee "be of such opinion," in the former instance, they "SHALL" report that opinion to the House; in the latter, they "MAY" make *orders for the payment* of all costs and expenses incurred by such "unfounded allegation."

The seven cases in which costs may become payable having been specified in the fifteenth chapter,* to which reference is made, it will be found that there are two, in which costs may be adjudicated upon independently of a Select Committee, and before it is even appointed. The first is in respect of the salutary section (s. 8) of the Election Petitions Act, 1848, enabling those who have presented a petition to withdraw it, on giving due notice to the Speaker, sitting member, and his agents, and any party admitted to oppose it; the petitioners being then liable to such costs and expenses only, as may have been incurred up to that time. A petitioner should reflect, however, before presenting his petition, how soon serious expenses begin to be incurred by his opponents, and which ought to be stopped at the earliest practicable moment.

The second case in which costs may thus early become payable, is under the 15th section, enabling the examiner of recognizances to award costs to be paid by either party to the other, in respect of objections to the recognizances. This is a useful check upon groundless and pertinacious technical objections offered at that early stage of the proceedings.

The costs in both the above cases are to be taxed, and recovered, in the mode which will presently be pointed out.

The next two cases in which costs may become payable, are those, under the 89th and 90th sections, of petitioners, or their opponents FRIVOLOUSLY OR VEXATIONOUSLY prosecuting, or OPPOSING, a petition.

This is a matter, as has been already intimated, of pure discretion with the committee, governed by a consideration of the whole acts and conduct of the parties. Committees have not frequently to exercise these powers, doubtless from the very fear inspired by the existence of these powers. If a committee see that a petition, or the opposition to it, must have had its inception in mere wantonness, or such gross negligence in ascertaining facts, as the result shows is imputable to the prosecutors or opponents of a petition, they cannot complain of the exercise of those powers. There may, however, be another reason why comparatively so few recorded instances exist, of committees inflicting costs—namely, the amicable arrangements come to

* Ante, pp. 298, 299.

between the parties, as soon as they conceive themselves to have ascertained the temper of the committee, and their view of one or two points on which the principal reliance had been placed. Petitioners and opponents are generally glad to escape from a perilous position as soon as possible, and without indulging an exacting spirit. Where, however, a petition is carried on to its close, the party considering himself entitled to costs under these sections, makes *an application* to the committee, usually immediately after the resolutions have been announced declaring the fate of the petition. The question generally turns upon the knowledge which the petitioner or his opponent had, or might have had, of the position of the facts at the earliest stage of the proceedings. Now that the parties themselves are compellable to be examined, more light can be thrown on these matters than has been hitherto admissible. If a charge be made against the sitting member *personally*, as well as by his agents, he is justified in resisting it up to the point of exonerating *himself*, however clear the case may be against his agents. If he withdraw at that point, he will not be liable to costs for a frivolous or vexatious opposition.* The *Cheltenham* committee † [A.D. 1848] held, that, "in order to make the sitting member liable for costs, there must be clear proof of knowledge, on his part, of the circumstances of bribery imputed to him and his agents. "It there appeared," said the chairman, "that the counsel for the sitting member had taken the first feasible opportunity of withdrawing from the contest; and therefore it would be very hard, under these circumstances, to visit him with costs."

The next case is that under the 91st section, where an election or return, or the omission to make a return, or the making an insufficient one, is reported to have been vexatious, or corrupt. If, for instance, a candidate, knowing himself to have been ineligible on any ground, or to have obtained his election by any illegal means, when it is impeached, decline to defend it, and yet give no due notice of the fact to the Speaker, the parties, and all concerned, whereby costs are incurred in setting aside his election, he, and any elector admitted to oppose the petition, will be held guilty of vexatious, if not corrupt conduct, and liable to the full costs and expenses occasioned by their misconduct.

The next case is that provided for by the 92nd section, protecting voters from frivolous or vexatious objections to their votes, and rendering it indispensable on the part of those meditating a scrutiny, to make such proposed objection the subject of serious consideration; for the full costs and expenses to which they expose any such

* *Derby* case [A.D. 1848], Print. Min. 115, 116.

† Print. Min. 54.

voter, he is entitled to recover from "the party ON WHOSE BEHALF such objections were made."

Attention may here be called to the second of the parliamentary resolutions,* which requires costs demanded by either party in any particular case, to be made "*immediately after the decision in that particular case.*" By this means the committee are enabled equitably to decide that question while all the facts are fresh in their mind, which show whether there was sufficient doubt about either the law or the fact, to justify challenging a particular vote before the committee. No general rule, obviously, can be laid down on this subject. The *Harwich* (1st)† [A.D. 1848] refused the costs of supporting a vote objected to on the ground of the insufficient value of the qualifying property, as they considered the parties justified in the objection, under the circumstances. A committee, however, will not allow parties to inflict on voters annoyance and expense with impunity, where a little caution and exertion might have proved the needlessness and futility of an objection.

The last case is that at which the 93rd section is aimed, and is one of great importance, its object being to protect one party and his agents from specific allegations made with reference to their conduct, by their opponents, when those allegations are unfounded, and made "without any reasonable or probable ground." The anxiety occasioned by such imputations may well justify no small exertion and expenditure to refute them, and obviate their consequences, and committees are disposed to regard such cases liberally and benignantly. Wantonly to impugn a member's qualification, or to impute to him and his agents bribery or corruption, or malpractice of any kind, entails on them the absolute necessity of vigilance, from the first, in their own defence; and it would be highly unjust to fix them with the expense of doing so. The least reparation that can be made, is to abandon such a charge at the earliest moment, and so escape *pro tanto* from the pecuniary consequences of improvident imputation.

It may be observed that the Election Petitions Act, 1848, gives no power to award costs to other than voters, or parties and their agents and functionaries whose conduct is wrongfully impugned. Thus, in the *Lyme Regis*‡ case [A.D. 1848], the committee refused costs, where applied for on behalf of a clergyman who had been groundlessly charged with bribing a voter, no evidence having been offered in

* Chap. XXVI., ante, p. 631.

† Print. Min. 220.

‡ P. R. & D. 34.

support of it, though he had been kept a long time under the derogatory imputation. The committee strongly censured the parties, but yielded to the argument that the act gave them no power to inflict costs.

The last case of costs, namely, that provided for by the 93rd section, is one which may give rise, perhaps, to troublesome questions as to the *quantum* to be allowed. If, for instance, a petition should charge two or more sitting members, jointly, with bribery or treating, and one of them be ultimately acquitted of the charge, it is conceived that he would be entitled to recover the costs which he had incurred, exactly as if he had been solely petitioned against, unless the case against him be abandoned before the final determination of the committee. Till such abandonment or decision, his counsel and agents cannot quit a committee-room for a single moment: for any question to a witness called apparently as against the other sitting member only, may serve to fix with fatal liability one who was not present watching his own interests.

II. The mode in which the amount of costs is ascertained, and the payment of them enforced, remains alone to be considered; and it depends on sections 94—102, both inclusive.

Any party adjudged entitled by the committee to costs, may within THREE CALENDAR MONTHS after the determination of the merits of the petition, or after any order of the House discharging the order of reference of the petition to the general committee, or after the withdrawal of the petition (under s. 8), apply to the Speaker to direct the costs to be taxed, by either the Examiner of Recognizances, or the Taxing officer of the House of Commons; on which either of those officers must tax such costs, examining on oath, by witnesses or affidavits. After he shall have taxed the costs, he is to report to the Speaker the following matters only:—

- (1.) The amount of the costs.
- (2.) The name of the party liable to pay them.
- (3.) The name of the party entitled to receive them.*

The Speaker, on application to him for the purpose, must deliver to the party a CERTIFICATE, SIGNED BY HIMSELF, expressing

- (1.) The amount of the costs and expenses allowed in the Report.
- (2.) The name of the party liable to pay the same.
- (3.) The name of the party entitled to receive the same.

* Elect. Pet. Act, 1848, s. 94.

And this certificate is

CONCLUSIVE EVIDENCE, FOR ALL PURPOSES WHATEVER, as well of the AMOUNT of the demand, as of the TITLE of the party therein named, to recover the same, *from the party therein stated to be liable to the payment of such costs*: and the party claiming under the same shall, on payment of the amount so specified in the certificate, give a receipt at the foot of it; which shall be a sufficient discharge for such costs.

Either the party or his representatives, entitled under the certificate, may demand the whole sum specified in it, from any one or more of those liable to pay it; and if they fail, on demand, to do so, those entitled may sue for it in the Courts of Record at Westminster, Dublin, or Edinburgh; and in the action, "it shall be sufficient for the plaintiff to declare that the defendant is indebted to him in the sum mentioned in the certificate."

In England, the declaration under the Common Law Procedure* Act (1852), may be in this form.

"For that the defendant is indebted to the said A. B. in the sum of £—— being the sum of money mentioned in a certain certificate of, and signed by, the Speaker of the House of Commons, duly made and granted according to the statute in that case and behalf."

On filing this declaration, together with the Speaker's certificate, and an affidavit of the demand for payment, the plaintiff may sign judgment as for want of a plea, by *nil dicit*, and take out execution for the sum mentioned in the certificate, together with the costs of the action, according to due course of law. In order to put an end to such vexatious difficulties, as may be seen in the cases of *Ranson v. Dundas*,† and *Bruyeres v. Halcomb*, till the passing of this act,‡ in enforcing payment of the parliamentary costs under the Speaker's certificate, the act in question provides that if the Speaker's handwriting be duly verified, 'the VALIDITY of the certificate shall not be called in question in any court.'§ It is also provided by the act that any person from whom the amount of the costs and expenses has been recovered, may in turn recover a proportionate share from the others who are liable with him.—The mode of procedure to put in suit the Recognizance, will be found so minutely specified in the 98th—102nd

* 3 Bing. N.C. 123.

† 3 A. & Ell. 394.

‡ Sect. 96.

§ Vide post, pp. 350, A.—352, A.

sections of the Election Petitions Act, 1848, as to render superfluous a repetition of them here.

The provisions respecting the ascertainment and recovery of costs under stat. 5 & 6 Vict. c. 102, in the case of GENERAL BRIBERY are closely analogous to those which have been already considered. The general scope of these provisions is indicated at the close of the fifteenth Chapter;* and in detail in the statute itself.†

The expenses of witnesses, and of the inquiry generally, under stat. 15 & 16 Vict. c. 57 [The Corrupt Practices Act], are provided by the 14th and 15th sections.‡

* P. 300.

† Post, 270, A.—273, A.

‡ Post, 362, A., f.

FORMS AND PRECEDENTS.

1. *Form of Recognizance under the Election Petitions Act, 1848.**

[Being the Schedule of the Act 11 & 12 Vict. cap. 98, ante, p. 352, A.]

Be it remembered, that on the — day of —, in the year of our Lord 18—, before me A. B., Esquire, Examiner of Recognizances for the House of Commons, [or C. P., one of her Majesty's justices of the peace for the — of —], came —, and acknowledged himself [or severally acknowledged themselves] to owe to our sovereign lady the Queen the sum of One thousand pounds [or the following sums; (that is to say,) the said — the sum of —, the said — the sum of —, the said — the sum of —, and the said — the sum of —], to be levied on his [or their respective] goods and chattels, lands and tenements, to the use of our said sovereign lady the Queen, her heirs and successors.

The condition of this recognizance is, that if [*here insert the names of all the petitioners, and, if more than one, add, or any of them*] shall well and truly pay all costs and expenses in respect of the election petition signed by him [or them] relating to the [*here insert the name of the borough, city, or county*], which shall become payable by the said petitioner [or petitioners] under the Election Petitions Act, 1848, to any witness summoned in his [or their] behalf, or to [*the sitting member,*] or other party complained of in the said petition, or to any party who may be admitted to defend the same as provided by the said act, then this recognizance to be void, otherwise to be of full force and effect.

C. D.
E. F.
G. H.
I. K.

Note.—When the recognizance is taken by a justice, the following form of acknowledgment is to be used:

Taken and acknowledged by the above-named
C. D., E. F., &c., the day and year first
above written, at —, in the county of
—, before me,
C. P.,
One of her Majesty's justices of the
peace for the county of —.

* See the decisions of the Examiner of Recognizances, in the Session 1852-3, on various objections to recognizances and the affidavits accompanying them, ante, pp. 296—298.

2. *Affidavit of Surety.**

E. F., of No. — street, in the city of —, merchant, maketh oath and saith, that he is seised or possessed of real [*or personal*] estate (*or both*), above what will satisfy his debts, of the clear value of the sum of *One thousand pounds* [*or for whatever sum for which the surety becomes bound.*]

Sworn at —, this — day of —,	}	E. F.
185—, before me,		
C. P.,		
One of her Majesty's justices of the peace for the county of —.		

3. *Notice to Speaker on the Withdrawal of Petition.*

Sir, — Street, —, 185—.

As agent for A. B., Esq., in the matter of his petition, delivered in on the — day of — last, complaining of an undue election and return for the borough of —, I hereby beg to inform you that it is not intended to proceed with the said petition.

I have the honour to be, Sir,

Your very obedient servant,

To the Right Honourable

The Speaker of the House of Commons.

C. D.

4. *Sitting Member's Letter, declining to defend his Return.*

Sir, — Street, —, 185—.

I beg to inform you that it is not my intention to defend my election or return for the borough of —.

I have the honour to be, Sir,

Your very obedient servant,

To the Right Honourable

The Speaker of the House of Commons.

E. F.

5. *Speaker's Warrant for the Attendance of Witnesses.*

Whereas, by an order of the House of Commons, a petition of —, complaining of an undue election and return for the — of —, has been presented to the House of Commons, the matter of which petition

* The Examiner [1852-3] has decided, that no objection can be taken, under the Election Petitions Act, 1848, s. 13, to the validity of the affidavit, jurat or caption, ante, 297.

is to be tried by a select committee, to be appointed under the "Election Petitions Act, 1848:"

These are therefore to require you —, and each and every of you, to be and appear before the said select committee, at such time or times as shall be notified to you by the parties, or either of them, — the said petition, or their or either of their agents or agent; and to receive and obey such further order as the said select committee to be appointed to try the matter of the said petition shall make concerning the same.

As you will answer the contrary at your peril.

Given under my hand, the — day of —, 185—.

CHARLES SHAW LEFEVRE,
Speaker.

6. *Speaker's Warrant when a Witness is to produce Papers, Books or Records.*

Whereas, by an order of the House of Commons, a petition of —, complaining of an undue election and return for the — of —, has been presented to the House of Commons, the matter of which petition is to be tried by a select committee, to be appointed under the "Election Petitions Act, 1848:"

These are therefore to require you — to bring in your custody — [here give us exact and full a description of the documents required as may be] and therewith to be and appear before the said select committee, at such time or times as shall be notified to you by the parties, or either of them, — the said petition, or their or either of their agents or agent, and to receive and obey such further order as the said select committee to be appointed to try the matter of the said petition shall make concerning the same.

As you will answer the contrary at your peril.

Given under my hand the — day of —, 185—.

CHARLES SHAW LEFEVRE,
Speaker.

7. *Speaker's Warrant for the Inspection and Production of Public Papers and Records.*

Whereas, by an order of the House of Commons, the matter of the petition of A. B., Esq., and also of the petition of the several persons whose names are thereunto subscribed, on behalf of themselves and others, being lawful electors of the borough of L., in the county of H., severally complaining of an undue election and return for the said borough of L., are appointed to be taken into consideration on —, the — day of — next, at — of the clock in the afternoon; These are therefore to require you, C. D., town clerk of the said borough of L., and E. F., vestry clerk of the parish of L., and such other person or persons as have in his, her, or their custody or power the rates

or assessments made for the relief of the poor of the said parish, and the public books, public papers, and public writings of and belonging to the said parish, to permit the said A. B., Esq., or his agent or agents, to inspect the same, and take such notes and copies thereof as he or they shall think fit. And that you, the said C. D., town clerk, and E. F., vestry clerk, and the other persons aforesaid, or some one for you, do attend the House of Commons upon —, the said — day of — next, at — of the clock in the afternoon of the same day, with such of the said rates or assessments, public books, public papers, and public writings, of and belonging to the said parish as aforesaid, as he, the said A. B., Esq., or his agent or agents, shall require and give notice to be produced at the hearing of the matter of the said petition; as you, the said C. D., town clerk, and the said E. F., vestry clerk, and the other persons aforesaid, will answer the contrary at your perils. Given under my hand, the — day of —, 185—.

CHARLES SHAW LEFEVRE, Speaker.

On the last warrant there must be the following appointment endorsed:

I do hereby appoint L. M., of the Inner Temple, London, gentleman, and N. O., of L., in the county of H., gentleman, jointly and severally my agents and agent, for the purposes of the within order. As witness my hand, this — day of —, 185—.

8. *Notice by the General Committee.*

— ELECTION.

Pursuant to the provisions of the "Election Petitions Act, 1848," notice is hereby given, that a select committee to try and determine the matter of the petition complaining of an undue election and return for the borough of —, will be chosen by the general committee of elections, on —, the — day of —, at — o'clock in the afternoon, in No. — Committee Room of the House of Commons.

All parties interested are hereby severally directed to attend the said general committee of elections, by themselves, their counsel, or agents, at the time and place above mentioned.

E. F., Chairman.

House of Commons,
Dated this — day of —, 185—.

9. *Agent's notification to Witnesses for Attendance.*

— ELECTION PETITION.

Pursuant to the summons of the Right Honourable The Speaker of the House of Commons already served upon you in the matter of the above petition,

I, the undersigned, agent of —, hereby give you notice to be and appear before the select committee appointed to try the matter of the

said petition, at the House of Commons, in the city of Westminster, on —, the — day of —, at — o'clock in the forenoon of that day; and further, on your arrival in London, in attendance on this notice, to inform me immediately thereof, and of your place of abode.

Dated this — day of —, 185—.

Yours &c., C. D.

10. *Summons, by Chairman of Select Committee.*

HOUSE OF COMMONS.

Select Committee on — Election Petition.

die 185—.

— in the chair.

Ordered,

That — do attend this committee on —, the — day of —, at — of the clock.

G. H., Chairman.

11. *Allowances to Witnesses.*

The following is about the ordinary scale of allowances for expenses and loss of time, usually paid to witnesses summoned to attend committees on election petitions.

	Expenses.	Compensation for Loss of Time.
	PER DAY.	PER DAY.
Solicitors . . .	20s.	2 guineas.
Surgeons . . .	20s.	1 to 2 guineas.
Apothecaries . . .	20s.	1 guinea.
Surveyors . . .	20s.	1 guinea.
Architects . . .	20s.	1 guinea.
Auctioneers . . .	15s. to 20s.	15s. to 20s.
Tradesmen . . .	10s. to 15s.	10s. to 15s.
Innkeepers . . .	10s. to 15s.	10s. to 15s.
Artizans . . .	7s. to 10s.	7s. to 10s.
Labourers . . .	7s.	5s.

Private gentlemen, 20s. per day for expenses. } No compensation
Salaried clerks, where the salary continues, 15s. } for time.

Females, according to their station in life.

Travelling Expenses—the actual sum paid per coach or railway.

Sundays not reckoned in *compensation* for loss of time.

The day of arrival and the day of reaching home to be reckoned as one day as to expenses.*

* The above table of allowances to witnesses, together with the arrangement of the previous forms, [with the exception of No. VIII., which is taken from Mr. Rogers's Law and Practice of Election Committees, Appendix, p. v.], is taken, with slight variation, from the convenient Summary

12. *Standing Orders on Public Petitions, at the commencement of the First Session of the Parliament of 1852.*

[See them, ante, pp. 314—5.]

13. *Classification and Order of Reading Election Petitions.*

[See them, ante, pp. 314—5.]

14. *List of Objections on a Scrutiny.*

IN THE HOUSE OF COMMONS.

SESSION 185—.*

In the Matter of the Petition of — and another,
complaining of the Election and Return of
—, Esq., for the Borough of —.

The following is a list of the voters intended to be objected to, with the several heads of objections distinguished against the names of the voters excepted to, and which are intended to be objected and excepted to, by and on the part of the petitioners.

CLASS No. 1.

Number on Printed Register in force at the Election.	Name of Voter.	Heads of Objection.
6	A. B.	The vote of each party included in this class is objected to ; for, That each of the said parties did, by gifts or rewards, and by promise, agreement, or security for gift or reward, <i>corrupt or</i> procure † some person or persons to give his or their vote or votes, or to forbear to give his or their votes at the said election ; and for, That each of the said parties bribed a voter or voters ; and for, That each of the said parties by intimidation, bribery and undue influence procured the return of the said R. W. C.
189	C. D.	
272	E. F.	
143	G. H.	
135	I. K.	

of the Practice of the House of Commons under the Election Petitions Act, 1848, published by Messrs. Vacher & Sons, 29, Parliament Street.

* This was the form used in the Borough of Harwich Election Petition, 1851.

† Sed vide ante, p. 438 et seq., as to this being a valid ground of objection.

CLASS No. 2.

Number on Printed Register in force at the Election.	Name of Voter.	Heads of Objection.
75	A. B.	<p>The vote of each party included in this class is objected to ; for,</p> <p>That each of the said parties did ask, receive or take money or other reward by way of gift, loan or other device, or agreed or contracted for money, gift, office, employment or other reward, to give his vote or to refuse or forbear to give his vote at the said election ; and for,</p> <p>That each of the said parties was bribed at the said election ; and for,</p> <p>That each of the said parties was corruptly influenced to give his vote at the said election for the said R. W. C.</p>
90	C. D.	
91	E. F.	
286	G. H.	

CLASS No. 3.

Number on Printed Register in force at the Election.	Name of Voter.	Heads of Objection.
102	A. B.	<p>The vote of each party included in this class is objected to ; for,</p> <p>That each of the said parties was improperly registered, and his name improperly retained and inserted upon and in the register of voters in force at the time of such election, by the express decision of the revising barrister who revised the list of voters from which such register was formed ; and for,</p> <p>That each of the said parties had not occupied as owner or tenant any sufficient qualification to be registered ; and for that he had not occupied such qualification for a period of twelve calendar months next previous to the 31st day of July, 185— ; and for that he had not been duly rated to the relief of the poor, and had not paid all the poor rates and assessed taxes due and payable from him in respect of the premises for which he was registered ; and for,</p> <p>That he had not resided for six calendar months next previous to the 31st day of July, 185—, within the borough of —, or within seven statute miles thereof, and for that each of the said parties had no right to a vote.</p>
13	C. D.	
280	E. F.	
68	G. H.	
156	I. K.	

CLASS No. 4.

Number on Printed Register in force at the Election.	Name of Voter.	Heads of Objection.
148	A. B.	<p>The vote of each party included in this class is objected to ; for,</p> <p>That each of the said parties had been within twelve calendar months before the time of his voting employed in charging, collecting, levying or managing the customs or some branch or part thereof; and for,</p> <p>That he was legally incapacitated by statute.</p>
238	C. D.	

CLASS No. 5.

Number on Printed Register in force at the Election.	Name of Voter.	Heads of Objection.
8	A. B.	<p>The vote of each of these parties is objected to ; for,</p> <p>That each of them had not ever since the 31st day of July, 185—, resided, and at the time of voting did not continue to reside, within the borough of —, or within seven miles thereof.</p>
84	C. D.	
57	E. F.	
72	G. H.	

The petitioners will claim to add the votes of A. B., C. D., E. F., G. H., I. K., &c. &c., to the poll of — —, esquire, on the ground that each of the said parties duly tendered his vote at the election, and that his name had been omitted from the register by the express decision of the barrister who revised the list of voters. And also the vote of O. P., a registered voter of the said borough, who tendered his vote at the said election for the said — —, esquire, and whose vote was then and there given and received for the said — —, esquire, but was not reckoned by the returning officer in casting up the number of votes voted at the said election, and in declaring the final state of the poll.

(Signed) J. G.,
 Agent for the petitioner A. B.
[or of the sitting member, as the case may be].
 This — day of —, 185—.

PRECEDENTS OF PETITIONS.

Under the Election Petitions Act, 1848, s. 2, ante, p. 301.

15. *General Commencements and Statements of the Petitioner's Right to petition.**

To the Commons of the United Kingdom in Parliament assembled.†

The humble petition of the person [*or persons*] whose name is [*or are*] hereunto subscribed [*elector, candidate, &c. &c., as the case may be*].

SH EWETH,

That your petitioners were, at the last election of members to serve in this present parliament for the borough of —, registered electors of the said county [*or borough,*] and had a RIGHT TO VOTE at the said election

Or,

Were registered electors, and VOTED at the said election

Or,

Were registered electors, and had a right to vote, AND DID vote at the said election

Or,

That your petitioner was a CANDIDATE at the last election of a member to serve in this present parliament for the county [*or borough*] of —

Or,

That your petitioner CLAIMS to have had, and HAD a right to be RETURNED [*or ELECTED*] at

16. *Petition against Two Sitting Members on the Grounds of Bribery and Treating.‡*

That at the said last election of members to serve in parliament for the said borough of —, in the month of —, 18—, A. B., C. D. and E. F. were candidates to represent the said borough in parliament.

That a poll having been demanded, was taken by the returning officer for the said borough on the — day of —, 18—.

* See this matter discussed at length, ante, pp. 301, et seq., (Chapter XVI., 'The Petition and the Petitioners,') and pp. 333 et seq., (Chapter XVIII., 'Jurisdiction of the Select Committee.') At pp. 335, 336, will be found a careful analysis of the respective statements of the right of petitioning, in all petitions [one hundred and nine], after the General Election of 1852, in conformity with the Election Petitions Act, 1848; and at p. 337, a general intimation of the statement of the right in the petitioner after the preceding General Election, under stat. 7 & 8 Vict. c. 103, s. 3.

† The omission of these words has been decided to be no ground of objection before a Select Committee, *St. Alban's*, 1851; Printed Minutes, p. 2; P. R. & D. 279; ante, p. 322.

‡ This form was settled by three of the most eminent leading parliamentary counsel in the year 1848.

That the said A. B. and C. D. were by the said returning officer declared to have had a majority of votes at the said election, and to have been duly elected, and were returned as members duly elected, to serve in this present parliament for the said borough of ———.

BRIBERY. *As against A. B.]* That before and at and during the said election the said A. B. was by himself and by his agents, friends and managers, guilty of divers acts of bribery and corruption *in order to corrupt and procure*, and *did* by his agents, managers and friends, and by many other persons *employed in his behalf*, by gifts, presents, money, rewards, and by promises and agreements and securities for money, gifts, employment and rewards, and by threats, intimidations, promises, undue influence, and other corrupt and illegal practices, acts and means, *corrupt and procure* divers persons having or claiming to have votes at the said election to give their votes in favour of him, the said A. B., and of the said C. D., or of one of them, or to forbear to give their votes in favour of the said E. F.

That the said A. B., by the said corrupt and illegal practices, was and is wholly incapacitated and ineligible to serve in this present parliament for the said borough; and the said election and return of the said A. B. were and are wholly null and void.

BRIBERY. *As against C. D.]* That before, and at and during the said election, the said C. D. was by himself and his agents, friends and managers, guilty of divers acts of bribery and corruption *in order to corrupt and procure*, and *did* by his agents, managers and friends, and by many other persons employed in his behalf, by gifts, presents, money, rewards, and by promises and agreements and securities for money, gifts, employment and rewards, and by threats, intimidations, promises, undue influence, and other corrupt and illegal practices, acts and means, *corrupt and procure* divers persons having or claiming to have votes at the said election, to give their votes in favour of him, the said C. D., and of the said A. B., or of one of them, or to forbear to give their votes in favour of the said E. F.

That the said C. D., by the said corrupt and illegal practices, was and is wholly incapacitated and ineligible to serve in this present parliament for the said borough, and that the said election and return of the said C. D. were and are wholly null and void.

TREATING. *As against A. B., under stat. 7 Will. 3, c. 4, s. 1 (ante, p. 529).]* That after the teste of the writ for holding the said election, and before and at and during the said election, the said A. B. did by himself and his agents, friends and partisans, by divers ways and means in his behalf, or at his charge, directly and indirectly, give, present and allow, to persons having votes in and at the said election, money, meat, drink, entertainment and provision, and did make presents, gifts, rewards and entertainments, and did make promises, agreements, obligations and engagements to give and allow money, meat, drink, provision, presents, rewards and entertainments to and for persons having votes in and at the said election, and to and for the use, benefit and advantage, employment, profit and preferment of such persons, in order that he the said A. B. might be elected to serve in this present parliament for the said borough.

That by reason of the said last mentioned corrupt and illegal prac-

tices, the said A. B. was and is wholly incapacitated and ineligible to serve in this present parliament for the said borough, and the said election and return of the said A. B. were and are wholly null and void.

TREATING. *As against C. D., under stat. 5 & 6 Vict. c. 102, s. 22.]* That before, during and after the said election, the said C. D. did by himself and his agents, friends and partisans, in divers ways, directly and indirectly, give and provide, and did cause and did knowingly allow to be given and provided, wholly or partly at his expense, and did pay wholly or in part divers expenses incurred for meat, drink, entertainment and provision to and for divers persons for the purpose of corruptly influencing divers of such persons, or divers other persons, to give their votes in the said election for the said C. D., or to refrain from giving their votes in the said election for the said E. F., and for the purpose of corruptly rewarding such persons, or divers other persons, for having given their votes in the said election for the said C. D. or for having refrained from giving their votes at the election for the said E. F.

That by reason of the said last mentioned corrupt and illegal practices, the said C. D. was and is wholly incapacitated and ineligible to serve in this present parliament for the said borough, and the said election and return of the said C. D. were and are wholly null and void.

General bribery by friends and agents of both Sitting Members.] That gross, extensive, and systematic, and open, and notorious bribery and corruption were practised and carried on at the said election by divers persons, being friends, supporters and partisans of the said A. B. and C. D., with a view to the election of the said A. B. and C. D.; and that the said election and return of the said A. B. and C. D. were procured by means of such bribery and corruption.

That by reason of the last mentioned corrupt and illegal practices, the said election and return of the said A. B. and C. D. or one of them were and are wholly null and void.

Intimidation and duress by friends of both Sitting Members.] That fraud, intimidation and duress were by the agents, friends and managers, and by other persons on behalf of the said A. B. and C. D., practised upon divers persons having votes at the said election, by means whereof many persons who, but for such illegal practices, would have voted in favour of the said E. F., were induced and compelled to vote in favour of the said A. B. and C. D. or one of them.

Per Quod, election of A. B. and C. D., or of one of them, void.] That by reason of the premises the said election and return of the said A. B. and C. D. or of one of them were and are wholly null and void.

PRAYER. *To declare the election and return of A. B. and C. D., or of one of them, void.]* Your petitioners therefore humbly PRAY, that your honourable House will take the premises into consideration, and will declare the said election and return of the said A. B. and C. D. to be wholly null and void, or will declare the said election and return of the said A. B. to be wholly null and void, or will declare the said election and return of the said C. D. to be wholly null and void, and will give to the petitioners such further and other relief as to the House shall seem meet.

such votes ought now to be struck off the poll; that divers persons were admitted to vote, and did vote, at the said election for the said J. C. who were disqualified by reason of their having made wagers or bets on the result of the said election, and the votes so admitted ought to be struck off the poll; that at the said election divers voters were counted on the said poll, in favour of the said J. C., who did not in point of fact vote for him, but who were personated and fraudulently represented by other persons who had themselves no title so to vote, but who so fraudulently tendered their votes and voted at the said election, and that such votes ought to be struck off the said poll; that the votes of divers persons were tendered and refused for the petitioner, which ought to have been received and added to the poll for the said petitioner; that divers persons at the said election are entered on the poll as having voted in favour of the said J. C. and the petitioner, whereas the said persons did in fact vote for the said J. L. and the petitioner, and that such votes so entered in favour of the said J. C. ought to be struck off the poll of the said J. C.; that, by the ways and means aforesaid, the said J. C. obtained an apparent majority over the petitioner, whereas, in truth and in fact, the petitioner had a majority of legal votes over the said J. C. and was duly elected a member to serve in the present parliament for the said borough, and ought to have been returned as such member; and praying that the House will take the premises into their consideration, and will declare the said election and return of the said J. L. and J. C., or of one of them, to be wholly null and void, and that the said J. L. and J. C., or one of them, were not duly elected and ought not to have been returned at the said election, and will amend the said return accordingly, or will declare that the election of the said J. C. was null and void, and that the said J. C. was not duly elected and ought not to have been returned, and that the petitioner had a majority of legal votes over the said J. C. at the said election, and was duly elected and ought to have been returned at the said election, and will cause the return to be amended by erasing the name of the said J. C. therefrom, and substituting the name of the petitioner instead of the name of the said J. C., and that the House will give to the petitioner such further or other relief as under the circumstances the House may think meet.



18. *Petition on the Ground of a Candidate's Want of Qualification to represent a Borough.*

That at the time of the said last election of members to serve in Parliament for the said borough, and of the return of the said C. D. as one of such members as aforesaid, he the said C. D. was not, according to the true intent and meaning of the act passed in the second year of the reign of Queen Victoria, intituled "An Act to amend the Laws relating to the Qualification of Members to serve in Parliament," duly qualified to be elected as a member to serve in parliament for the said borough, and was by reason of his want of such qualification as is mentioned in the said act for members to be elected to serve

second year of the reign of his late majesty King William the Fourth, intituled, "An Act to amend the Representation of the People in England and Wales," to entitle such persons to be registered, or on the ground of their having ceased to reside within the said borough, or within such distance so required as aforesaid, during some part of the period between the thirty-first day of July, one thousand eight hundred and —, and the time of their voting at such election, or on the ground of their not having continued to reside within the said borough, or within such distance so required as aforesaid, at the time of their so voting at such election, and that such votes were admitted and entered on the poll as good votes for the said J. C., and ought now to be struck off the poll; that at the said election divers persons voted for the said J. C. who were or had been, either during such election or within six calendar months previous thereto, or within fourteen days after it was completed, retained or employed at such election as agents, attornies, poll clerks, flagmen, or in some other capacity for the purposes of such election, and had either before, during or after such election, accepted, received or taken from the said J. C., or from some other person, for or in consideration of, or with reference to, such retainer and employment, a sum or sums of money, retaining fees, offices, places or employments, and that such votes were admitted and entered on the poll as good votes for the said J. C., and ought now to be struck off the poll; that many persons were admitted to vote, and did vote at the said election in favour of the said J. C., who had asked, received or taken money, gifts, employments, offices or rewards, or promises or agreements and securities for money, gifts, employments, offices or rewards, or who were otherwise bribed or corruptly influenced to vote at the said election in favour of J. L. and J. C., or one of them, or to forbear to vote at the said election for the petitioner, and that all the votes so admitted for the said J. C. ought to be struck off the poll; that many persons were admitted to vote, and did vote at the said election in favour of the said J. C., who did by themselves, or by persons employed by them, by gifts, rewards and employments, and by promises, agreements and securities for gifts, rewards and employments, and by divers illegal practices, corrupt and procure, or did offer by gifts, rewards and employments, or by promises, agreements and securities for gifts, rewards and employments, and by divers illegal practices, to corrupt and procure divers persons, having votes at the said election, to give their votes in favour of the said J. L. and J. C., or one of them, or to forbear to give their votes in favour of the petitioner, and the votes so admitted in favour of the said J. C. ought to be struck off the poll; that many persons were admitted to vote, and did vote at the said election for the said J. C., who had been treated, or were guilty of treating, and other corrupt practices, at and before the said election, so as to disqualify them from voting at the same, and the votes of such persons ought now to be struck off the poll; that at the said election many persons were compelled, by violence, threats, intimidation and force, practised by friends, agents, partisans, managers, committee-men and supporters of the said J. L. and J. C., or one of them, to vote for the said J. C., or to forbear to vote for the petitioner, and

such votes ought now to be struck off the poll; that divers persons were admitted to vote, and did vote, at the said election for the said J. C. who were disqualified by reason of their having made wagers or bets on the result of the said election, and the votes so admitted ought to be struck off the poll; that at the said election divers voters were counted on the said poll, in favour of the said J. C., who did not in point of fact vote for him, but who were personated and fraudulently represented by other persons who had themselves no title so to vote, but who so fraudulently tendered their votes and voted at the said election, and that such votes ought to be struck off the said poll; that the votes of divers persons were tendered and refused for the petitioner, which ought to have been received and added to the poll for the said petitioner; that divers persons at the said election are entered on the poll as having voted in favour of the said J. C. and the petitioner, whereas the said persons did in fact vote for the said J. L. and the petitioner, and that such votes so entered in favour of the said J. C. ought to be struck off the poll of the said J. C.; that, by the ways and means aforesaid, the said J. C. obtained an apparent majority over the petitioner, whereas, in truth and in fact, the petitioner had a majority of legal votes over the said J. C. and was duly elected a member to serve in the present parliament for the said borough, and ought to have been returned as such member; and praying that the House will take the premises into their consideration, and will declare the said election and return of the said J. L. and J. C., or of one of them, to be wholly null and void, and that the said J. L. and J. C., or one of them, were not duly elected and ought not to have been returned at the said election, and will amend the said return accordingly, or will declare that the election of the said J. C. was null and void, and that the said J. C. was not duly elected and ought not to have been returned, and that the petitioner had a majority of legal votes over the said J. C. at the said election, and was duly elected and ought to have been returned at the said election, and will cause the return to be amended by erasing the name of the said J. C. therefrom, and substituting the name of the petitioner instead of the name of the said J. C., and that the House will give to the petitioner such further or other relief as under the circumstances the House may think meet.



18. *Petition on the Ground of a Candidate's Want of Qualification to represent a Borough.*

That at the time of the said last election of members to serve in Parliament for the said borough, and of the return of the said C. D. as one of such members as aforesaid, he the said C. D. was not, according to the true intent and meaning of the act passed in the second year of the reign of Queen Victoria, intituled "An Act to amend the Laws relating to the Qualification of Members to serve in Parliament," duly qualified to be elected as a member to serve in parliament for the said borough, and was by reason of his want of such qualification as is mentioned in the said act for members to be elected to serve

in parliament for boroughs incapable of being elected for the said borough; that the said C. D. was not at the time of the said election, and of his said return as such member as aforesaid, or at any time at and during the said election, seised or entitled for his own use or benefit of or to any estate, legal or equitable, in lands, tenements or hereditaments of any tenure whatsoever, situate, lying or being within the United Kingdom of Great Britain or Ireland, or in the rents or profits thereof for his own life or for the life or lives of any other person or persons, then living, or for a term of years either absolute or determinable on his own life or on the life or lives of any other person or persons then living, of which term not less than thirteen years were at the time of the said election unexpired, such estate being of the clear yearly value of not less than three hundred pounds over and above all incumbrances affecting the same, nor was the said C. D. at the time of the said election, or at the time of his said return as such member as aforesaid, possessed and entitled for his own use and benefit at law or in equity for his own life, or for the life or lives of any other person or persons then living, or for any term of years either absolute or determinable on his own life, or for the life or lives of any other person or persons then living, of which term not less than thirteen years were at the time of the said election unexpired, or of or to personal estate or effects of any nature or kind whatsoever, situated within the said United Kingdom, or the interests, dividends, or annual proceeds of any such personal estate or effects, such personal estate or effects, interest, dividends, or annual proceeds, actually producing the clear yearly income of not less than three hundred pounds over and above all incumbrances affecting the same; nor did the said C. D. at the time of the said election, and of his said return as such member as aforesaid, or at any time at and during the said election, possess more than one of the several kinds of qualification hereinbefore mentioned, being jointly sufficient to qualify him to serve as a member for the said borough; that the said C. D. was not, at the time of the said election, and of his said return as such member as aforesaid, the eldest son or heir apparent of any peer or lord of parliament, or of any person qualified by the said act to serve as knight of the shire; that the said C. D. during this present session of parliament, delivered in to the clerk of the House, at the table of the House, as by law provided, a paper signed by him, the said C. D., containing a statement of the estate and effects whereby he made out his qualifications, to the purport or effect following, that is to say—

STATEMENT OF QUALIFICATION.—*Statement of the lands, tenements, and hereditaments, or of the interest therein or arising therefrom, whereby I make out my qualification as a Member to serve in Parliament pursuant to the Act of the first and second years of the Reign of her Majesty Queen Victoria, intituled "An Act for amending the Laws relating to the Qualification of Members to serve in Parliament."*

NOTE.—If the member qualifies in respect of lands, tenements, or hereditaments, he must state the barony or baronies, parish or parishes,

township or townships, precinct or precincts, and also the county or counties in which such lands, tenements or hereditaments are situate, and also the estate in the said lands, tenements or hereditaments, or in the rents and profits thereof, or to which he is seised or entitled.

Barony, Parish, Township, or Precinct, in which the Lands, Tenements, or Hereditaments, are situate.	County.	Estate in the Lands, Tenements, or Hereditaments, or in the Rents or Profits of or to which the Party is seised or entitled.
Croydon	Surrey	Freehold
St. George's, Hanover Square	Middlesex	Leasehold
CHARLES DAWSON.		

Statement of the Personal Estate or Effects whereby I make out my Qualification as a Member to serve in Parliament, pursuant to the Act of the first and second years of the Reign of her Majesty Queen Victoria, intituled "An Act for amending the Laws relating to the Qualification of Members to serve in Parliament."

NOTE.—If the member qualifies in respect of personal estate or effects, he must state of what nature and where situate such personal estate or effects are, and what interest he hath in such personal estate or effects, and upon what securities and in whose names the same are vested.

Nature of Personal Estate or Effects, and where situate.	What Interest the Party hath in such Personal Estate or Effects.	Upon what Security, and in whose Names, such Personal Estate or Effects are vested.

NOTE.—In case the member qualifies in respect of qualifications jointly sufficient, he must make a similar statement in respect of each.

That the qualification mentioned and described in the said declaration is wholly insufficient and invalid to qualify the said C. D. as a member to serve in parliament for the said borough; that at the time of the said election and return, and of making the declaration aforesaid, the said C. D. was not seised or entitled either at law or in equity, and had not such an estate for his own use and benefit in or to the lands mentioned in the said declaration, or the rents or profits thereof, as is mentioned in the said declaration, or as would qualify

him, the said C. D., to be elected as a member for the said borough, according to the true intent and meaning of the said act, and that the qualification arising out of the said lands mentioned in the said declaration was insufficient to qualify the said C. D. as a member to serve in parliament for the said borough; that the lands mentioned in the said declaration, and out of which the qualification of the said C. D. is therein stated to arise, are not of sufficient value, either annually or otherwise, to confer a qualification on the said C. D., to enable him to serve in parliament for the said borough; that the qualification mentioned in the said declaration is insufficient both as regards the title of the said C. D. and the entire of the property described to confer a qualification on the said C. D. to be elected as a member to serve in parliament for the said borough; that the said C. D. was not at the time of his said election, by reason of his want of qualification, capable of being elected as member for the said borough, and was not qualified to serve in parliament, and that the election and return of the said C. D. were and are wholly null and void; that the election and return of the said C. D. were and are under the circumstances hereinbefore set forth wholly null and void.

19. Petition from Scotland for a Scrutiny, alleging Votes improperly inserted or retained in or expunged from the Register by the Sheriff and the Appeal Court, deficient Qualification, &c., &c., and Votes after Loss of Qualification.

That various persons were illegally and improperly put upon the registers of voters for the said several burghs of —, made up in pursuance of the provisions of the act of parliament, second and third William the Fourth, chapter sixty-five, or upon one or more of such registers described by characters, titles and descriptions of qualifications in such registers respectively set forth, although such persons did not truly possess the characters, titles or descriptions of qualifications for or in respect of which they were severally so registered; and although certain of such characters, titles, and descriptions of qualifications were not of a kind which confer a legal right to vote, and such persons, although having no right to vote owing to such misdescription or non-possession as aforesaid, nevertheless unduly and illegally were allowed to vote and did vote for the said J. K. at the said election, and the votes of such persons were unduly and illegally counted on the poll at the said election for the said J. K., and ought to be struck off the poll; that various persons not legally qualified or entitled to be registered or to vote were admitted to be registered as voters, and did unlawfully vote for the said J. K. at the said election, whose votes ought to be struck off the poll; that various persons who had claimed and had been admitted to registration, and whose names appeared upon the said registers of voters in force at the time of the said election, or one or more of such registers, were not still possessed, but were

divested wholly or partially of the qualifications in respect of which they had so claimed and been admitted and registered, or such qualifications had since such admission and registration undergone such alterations as rendered them inadequate, unavailable, null and bad, and such persons had ceased to reside within the limits or distance required by law, and such persons were not entitled to vote, and ought not to have been admitted to vote, yet such persons were admitted to vote, and did unlawfully vote, for the said J. K., and their votes ought to be struck off the poll; that various persons who were not qualified to vote at the said election, and various persons who were personally disqualified from voting, or disqualified by statute, were unlawfully admitted to vote, and did unlawfully vote at the said election for the said J. K., and the votes of all such persons ought to be struck off the poll; that various persons who had been registered as voters for one or other of the said burghs, and whose names appeared on the said registers of voters, or one or more of such registers, as proprietors or occupants of properties within one or other of the said burghs, but who had become disqualified and had ceased to be the proprietors or occupants, wholly or in part, of the properties for or in respect of which they had been so registered, or had ceased to hold such property for their own benefit, and not in trust for or at the pleasure of any other person, did notwithstanding at the said election take the oath of possession put to them in terms of the said act of parliament when their respective votes were tendered, and did then and there falsely and fraudulently swear that they were still proprietors or occupants respectively of the properties for which they were respectively so registered, and that they held the same for their own benefit and not in trust for or at the pleasure of any other person, and such persons were thereupon admitted to vote by means of the oaths so falsely and fraudulently sworn by them, and did unlawfully vote for the said J. K., and that the names of various such persons have since been expunged from the registers by the registration sheriff and appeal courts, and that the votes of all such persons ought to be struck off the poll; that certain persons who at the said election tendered their votes and did vote for the said J. K., and swore that they were still the proprietors or occupants of the properties for which they were respectively registered, did, after the teste of the writ for the said election, fraudulently re-enter or obtain false, collusive, and colourable possession of such properties for the purpose of the said election, and did falsely and fraudulently swear that they were still such proprietors or occupants, and were thereupon admitted to vote by means of such oaths, and did unlawfully vote for the said J. K., although they were not truly proprietors or occupants of such properties or in right of occupancy thereof, and the votes of all such persons ought to be struck off the poll; that by false swearing and other fraudulent practices various persons who had no lawful right to vote illegally and wrongfully procured their votes to be taken and counted on the poll at the said election for the said J. K., and their votes ought to be struck off the poll; that various persons claimed and were admitted to vote and did vote at the said election for the said J. K. as being upon the said registers of voters for the said several burghs, or one or more of such registers, in respect of certain qualifications set forth therein of

descriptions not known to or recognized in law, and which do not in law afford a qualification to vote, and in point of fact such persons had no lawful qualifications to vote, nevertheless their votes were unduly and wrongfully counted on the poll for the said J. K., and the names of various such persons have, since the said election, been expunged from the registers by the registration sheriff and the appeal courts, and ought to be struck off the poll; that a certain voter, namely, J. B., keeper of a weighhouse, claimed and was admitted to vote, and did vote, at the said election, for the said J. K., as being upon the register for the burgh of —, in respect of his being tenant and occupant, as set forth in the said register, of a weighhouse, whereas the use or occupancy of such machine is not a ground of qualification known to law, and does not afford a legal qualification to vote, and, in point of fact, the said J. B. had no lawful qualification of adequate value, nevertheless the vote of the said J. B. was unduly and illegally counted on the poll for the said J. K., and the name of the said J. B. has since the said election been expunged from the register by the registration sheriff and appeal court, and his vote ought to be struck off the poll; that at certain registration courts heretofore held in the said county of — in pursuance of the said act of parliament the sheriff of the said county illegally and erroneously refused to admit to registration and rejected or expunged various persons who were duly qualified and entitled to be registered as voters for one or other of the said several burghs, and to remain on the said registers of voters, and to vote in the election of a member for the said district of burghs, and who claimed to be registered as voters for one or other of the said several burghs, and who would have voted for your petitioner at the said election, and two of such persons tendered their votes under protest for the petitioner at the said election, but the said votes were excluded in counting the poll, and ought to be added to the poll, and the said sheriff at certain registration courts heretofore held as aforesaid illegally and erroneously admitted to registration and registered the claims of various persons whose claims were bad and objectionable, and who were not qualified or entitled to be registered as voters or to vote, and who illegally and wrongfully voted for the said J. K. at the said election, and also refused to reject or expunge various other persons whose claims were bad, objectionable and null, and who were not qualified and entitled to be registered as such voters, or to remain on the said registers of voters, or to vote at the said election, and who voted for the said J. K. at the said election; that by such illegal and erroneous refusals, and by such illegal and erroneous admissions as aforesaid, the representation of the said burghs could not duly and by law be carried out, to the great grievance of the electors of the said burghs, and of the petitioner, and for which said grievance the relief of the House is prayed; that the sheriffs who formed the court of appeal under the said act did in like manner at various appeal registration courts, heretofore held in virtue of the said act, for the purpose of hearing and deciding upon appeals from the decision of the said sheriff, act illegally and erroneously in rejecting and refusing to admit to registration various persons who were duly qualified and entitled to be registered as voters for one or other of the said several burghs, and to

vote in the election of a member for the said district of burghs, and who claimed to be registered as voters for one or other of the said burghs, and who would have voted for the petitioner at the said election; and in admitting to registration the claims of various persons whose claims were bad or objectionable and null, and who were not qualified and entitled to be registered as such voters, or to vote at the said election, and who voted at the said election for the said J. K.; that the persons who were so illegally and erroneously rejected by the said sheriff and appeal courts were prevented from voting for the petitioner at the said election, as they otherwise would have done; and the persons whose claims were so illegally and erroneously admitted by the said sheriff and appeal courts were unlawfully allowed to vote and did vote thereat for the said J. K., and their votes ought to be struck off the poll; that by such illegal and erroneous refusals, and by such illegal and erroneous admissions as aforesaid, the representation of the said burghs could not duly and by law be carried out, to the grievance of the electors of the said burghs and of the petitioner, and for which grievance the relief of the House is prayed.

20. *Petition from Ireland, setting forth an organized and premeditated System of Excitement, Menace, Violence and Intimidation.*

That previous to and during the said election there was established and acted upon, not only in the said county but in the surrounding and adjoining districts of the country, an organized and premeditated system of excitement, menace, violence, riot, and outrage, for the purpose of intimidating and preventing the electors of the said —, who were willing and anxious to poll in favour of your petitioner, from polling for him, and of forcing and compelling certain of the said electors to vote for the said A. B. and C. D., or one of them, and that the said system of intimidation, violence, riot, and coercion, was carried on previously to, and during, and throughout the said election, and that divers electors were thereby terrified, coerced, and prevented from polling for your petitioner, and divers others of the said electors were coerced and compelled, contrary to their free will and intention, and by force and violence, and threats and intimidation of various kinds, to vote for the said A. B. and C. D., or one of them, and that the said election and return of the said A. B. and C. D. ought, by reason of the premises, to be declared null and void, and the votes so given for them, or either of them, struck off the poll; that for many days previous to the election, large and organized mobs and bodies of peasantry, in the interest of the said A. B. and C. D., and thereto instigated, employed, and led by their agents, managers, and partisans, proceeded by night as well as by day to the dwellings of divers electors who were known, or believed to be willing and anxious to vote for your petitioner, and by force, violence, and menaces, attempted to carry away, and in some instances succeeded in carrying away, several

of the electors, and by force and violence carried them away into distant parts of the country, and kept and detained them there by force and violence until after the close of the said election, in order to prevent them voting, and did thereby prevent them voting at the said election for the petitioner; that in like manner large and tumultuous mobs of persons, acting in the interest of the said A. B. and C. D., or one of them, and being thereto instigated, employed, and led by them, and their agents, managers, and partisans, proceeded to the dwellings of numerous other electors of the said county, and by violence, menaces, tumult, and intimidation, so terrified and overawed the said electors as thereby to induce them, contrary to their wishes and intentions, and out of fear of personal violence were compelled, to give their votes in favour of the said A. B. and C. D., or one of them, or to forbear from giving their votes in favour of the petitioner, whereby and by means whereof the said election and return is and ought to be null and void; that before, at, and during the said election, the most open, general, and outrageous violence and systematic intimidation were carried on by the agents, managers, and partisans of the said A. B. and C. D., and by persons employed and directed by them, or some of them, and by large mobs and bodies of persons hired and paid for the said purpose, and in the interest of the said A. B. and C. D., whereby several electors who were anxious to vote, and would have voted, at the said election for the petitioner, were induced through fear and terror to give their votes in favour of the said A. B. and C. D., or one of them, or to abstain from voting for the petitioner, whereby the said election and return is null and void; that, for the purpose of carrying on the said intimidation and violence, and exciting and causing fear and terror in the minds of the electors of said county, large mobs or bodies of persons, being in some part voters and inhabitants of the said county, but for the most part not being electors or inhabitants of the same, but persons who were induced and employed to come, and were led and brought into the said county by the said A. B. and C. D., and their agents, friends, partisans, and managers from various and distant districts of the county of —, and the county of —, and armed with sticks, bludgeons, and other weapons, were paraded through the said —, both by day and night, previous to and during, and until after the close of the said election, using threats and menaces of violence and injury to all such electors as should vote for the petitioner, and did on several occasions, by actual force, violence, and intimidation, prevent the petitioner and his friends and supporters from canvassing the electors of the said county, and force and compel him and them to abandon the business of the said electors, in violation of the freedom of election, and contrary to the laws and constitution of this realm; that, by reason of the aforesaid corrupt and illegal practices and violent, riotous and tumultuous proceedings, the said A. B. and C. D. were, and are, wholly disabled and incapacitated and ineligible to serve in this present parliament for the said — of —, and the election and return of the said A. B. and C. D., or of one of them, was, and is, wholly null and void; and praying that the House will take the said premises into consideration, and will find and declare the said election and return of

vote in the election of a member for the said district of burghs, and who claimed to be registered as voters for one or other of the said burghs, and who would have voted for the petitioner at the said election; and in admitting to registration the claims of various persons whose claims were bad or objectionable and null, and who were not qualified and entitled to be registered as such voters, or to vote at the said election, and who voted at the said election for the said J. K.; that the persons who were so illegally and erroneously rejected by the said sheriff and appeal courts were prevented from voting for the petitioner at the said election, as they otherwise would have done; and the persons whose claims were so illegally and erroneously admitted by the said sheriff and appeal courts were unlawfully allowed to vote and did vote thereat for the said J. K., and their votes ought to be struck off the poll; that by such illegal and erroneous refusals, and by such illegal and erroneous admissions as aforesaid, the representation of the said burghs could not duly and by law be carried out, to the grievance of the electors of the said burghs and of the petitioner, and for which grievance the relief of the House is prayed.



20. *Petition from Ireland, setting forth an organized and premeditated System of Excitement, Menace, Violence and Intimidation.*

That previous to and during the said election there was established and acted upon, not only in the said county but in the surrounding and adjoining districts of the country, an organized and premeditated system of excitement, menace, violence, riot, and outrage, for the purpose of intimidating and preventing the electors of the said —, who were willing and anxious to poll in favour of your petitioner, from polling for him, and of forcing and compelling certain of the said electors to vote for the said A. B. and C. D., or one of them, and that the said system of intimidation, violence, riot, and coercion, was carried on previously to, and during, and throughout the said election, and that divers electors were thereby terrified, coerced, and prevented from polling for your petitioner, and divers others of the said electors were coerced and compelled, contrary to their free will and intention, and by force and violence, and threats and intimidation of various kinds, to vote for the said A. B. and C. D., or one of them, and that the said election and return of the said A. B. and C. D. ought, by reason of the premises, to be declared null and void, and the votes so given for them, or either of them, struck off the poll; that for many days previous to the election, large and organized mobs and bodies of peasantry, in the interest of the said A. B. and C. D., and thereto instigated, employed, and led by their agents, managers, and partisans, proceeded by night as well as by day to the dwellings of divers electors who were known, or believed to be willing and anxious to vote for your petitioner, and by force, violence, and menaces, attempted to carry away, and in some instances succeeded in carrying away, several



of the electors, and by force and violence carried them away into distant parts of the country, and kept and detained them there by force and violence until after the close of the said election, in order to prevent them voting, and did thereby prevent them voting at the said election for the petitioner; that in like manner large and tumultuous mobs of persons, acting in the interest of the said A. B. and C. D., or one of them, and being thereto instigated, employed, and led by them, and their agents, managers, and partisans, proceeded to the dwellings of numerous other electors of the said county, and by violence, menaces, tumult, and intimidation, so terrified and overawed the said electors as thereby to induce them, contrary to their wishes and intentions, and out of fear of personal violence were compelled, to give their votes in favour of the said A. B. and C. D., or one of them, or to forbear from giving their votes in favour of the petitioner, whereby and by means whereof the said election and return is and ought to be null and void; that before, at, and during the said election, the most open, general, and outrageous violence and systematic intimidation were carried on by the agents, managers, and partisans of the said A. B. and C. D., and by persons employed and directed by them, or some of them, and by large mobs and bodies of persons hired and paid for the said purpose, and in the interest of the said A. B. and C. D., whereby several electors who were anxious to vote, and would have voted, at the said election for the petitioner, were induced through fear and terror to give their votes in favour of the said A. B. and C. D., or one of them, or to abstain from voting for the petitioner, whereby the said election and return is null and void; that, for the purpose of carrying on the said intimidation and violence, and exciting and causing fear and terror in the minds of the electors of said county, large mobs or bodies of persons, being in some part voters and inhabitants of the said county, but for the most part not being electors or inhabitants of the same, but persons who were induced and employed to come, and were led and brought into the said county by the said A. B. and C. D., and their agents, friends, partisans, and managers from various and distant districts of the county of —, and the county of —, and armed with sticks, bludgeons, and other weapons, were paraded through the said —, both by day and night, previous to and during, and until after the close of the said election, using threats and menaces of violence and injury to all such electors as should vote for the petitioner, and did on several occasions, by actual force, violence, and intimidation, prevent the petitioner and his friends and supporters from canvassing the electors of the said county, and force and compel him and them to abandon the business of the said electors, in violation of the freedom of election, and contrary to the laws and constitution of this realm; that, by reason of the aforesaid corrupt and illegal practices and violent, riotous and tumultuous proceedings, the said A. B. and C. D. were, and are, wholly disabled and incapacitated and ineligible to serve in this present parliament for the said — of —, and the election and return of the said A. B. and C. D., or of one of them, was, and is, wholly null and void; and praying that the House will take the said premises into consideration, and will find and declare the said election and return of

the said A. B. and C. D., or one of them, to be wholly null and void, and will declare the petitioner to have been duly elected a member to serve in this present parliament for the said — of —; and that the return may be amended accordingly, or that the House will declare that the election and return of the said A. B. and C. D., or one of them, is wholly null and void, and will grant such further and other relief in the premises as to the House shall seem meet.



21. Petition from Ireland, for a Scrutiny; unqualified Voters voting; Loss of Qualification after Registration; incapacitated Persons; Voters prevented by Violence.

That the majority of votes so declared by the said returning officer as aforesaid, in favour of the said A. B., was only an apparent and colourable majority, inasmuch as the votes of divers persons were accepted and recorded on the poll in favour of the said A. B. who were not legally entitled and had no legal right to vote at the said election, and the votes of divers persons duly qualified to vote at the said election, who tendered their votes for the petitioner, were rejected, and that the real majority of good and legal votes at the said election was in favour of the petitioner over the said A. B.; that the said election and return of the said A. B. was therefore entirely null and void, and that the petitioner was, in fact, duly elected, and ought to have been returned at the said election; that several persons voted at the said election, and their votes were counted on the poll, in favour of the said A. B., who were not registered as voters for the said county, and who had no colour of right or title to vote, but who personated and falsely and fraudulently represented other persons whose names appear upon the register of voters for the said county, but who were at the time of the election either dead or absent from the same, and that all such votes ought to be struck off the poll; that several persons voted at the said election, and their votes were counted on the poll, in favour of the said A. B., who had, within twelve months before the said election, received relief under the provisions of certain acts of parliament for the relief of the destitute poor, and all such votes should be struck off the poll; that several persons voted at the said election as rent-chargers, freeholders or leaseholders, and their votes were counted on the poll in favour of the said A. B., whose names appeared on the register of voters for the said county, but whose qualifications as voters did not continue at the time when they voted, but had ceased to continue previous to the said election and subsequent to the time of the formation of the register of voters in force at the said election, and all such votes should be struck off the poll; that several persons voted as rent-chargers, freeholders or leaseholders, and their votes were counted on the poll in favour of the said A. B., who had become bankrupt or insolvent since the time of making out the list of voters from which the before mentioned register was formed, and whose estates and interests

respectively in the premises in respect of which they had respectively been registered were then or had in the interval between the time of their registration and the time of voting legally vested in their assignees or other persons, and all such votes should be struck off the poll; that several persons voted at the said election, and their votes were counted on the poll in favour of the said A. B., whose qualification appearing in the register in force at the said election was the occupation of lands, tenements or hereditaments rated as of the net annual value of twelve pounds or upwards, who, since the expiration of the time of making out the list of voters from which such register had been formed, had been evicted from or had surrendered, assigned or otherwise parted with the possession of the premises in respect of which they were so registered and had ceased to occupy the same, and all such votes should be struck off the poll; that several persons voted at the said election, and their votes were counted on the poll in favour of the said A. B., whose registered qualification was the occupation of lands or premises rated as of the net annual value of twelve pounds or upwards, who, at the time of the formation of the register in force at the said election, were, under the last rate for the then time being, rated as occupiers of premises at the net annual value of twelve pounds or upwards, but who at the time of the election were under the last rate for the then time being no longer rated as the occupiers of premises at the net annual value of twelve pounds or upwards, and who, at the time of voting, were not in the occupation of the premises in respect of which they had respectively been registered, and who had thereby lost their qualification to vote, and all such votes should be struck off the poll; that several persons voted at the said election as rated occupiers, and their votes were counted on the poll in favour of the said A. B., who, by reason of certain incapacities which had arisen subsequently to the expiration of the time allowed for making out the list of voters from which the register in force at the said election was formed, were not at the time of the said election legally entitled to vote, and all such votes should be struck off the poll accordingly; that several persons voted at the said election, and their votes were counted on the poll, in favour of the said A. B., who, from various legal or other disabilities or incapacities, were incompetent and disqualified to vote for any candidate, and the petitioner submits that all such votes should be struck off the poll; that several persons who were duly registered as voters for the said county, and were in every respect entitled and qualified to vote at the said election, came to their respective polling places and tendered their votes in favour of the petitioner, and took or affirmed the several oaths by law prescribed, yet their votes were rejected by the sheriff or his deputies, contrary to law, and the petitioner submits that the votes of all such persons ought to be admitted and entered on the poll in his favour; that previous to and at the time of the said election, there prevailed throughout the said county an organized and universal system of agitation established for the purpose of intimidating and terrifying all electors of the said county who were desirous of voting for the petitioner, and to deter them by fear and open force from so voting; that in consequence thereof it was

highly dangerous for electors intending to vote for the petitioner to proceed to their several polling places; that several duly qualified electors of the said county, and more in number than sufficient to have turned the majority of votes in favour of the petitioner, and who were resolved and had declared their intention of voting for the petitioner, left their several places of abode for the purpose of proceeding to their several polling places and voting for the petitioner; that the several persons, while on their way to the said polling places, were intercepted and attacked by large numbers of persons assembled for that purpose; that some of these electors were violently and forcibly repulsed and driven back, and prevented from proceeding to their polling places and voting for the petitioner, as otherwise they would have done, and others of them were forcibly taken into houses or other places, and there forcibly detained, secreted, locked up and kept in close custody until the close of the poll, and were thereby prevented from voting for the petitioner, which otherwise they would have done, and that the votes of all such persons so forcibly prevented from voting as aforesaid ought to be added to and reckoned upon the poll in favour of the petitioner; that the said violence, and intimidation, and detention, were countenanced and encouraged by the friends and partisans of the said A. B., and by divers persons in the interest of the said A. B., for the purpose of preventing the said electors from voting for the petitioner.

22. *Petition setting forth the want of Qualification of a Candidate, and Notice to the Electors under special circumstances.**

That an election of members to serve in parliament for the borough of —, was held at —, on the seventh day of July, one thousand eight hundred and fifty-two, on which occasion there were three candidates for election to serve in parliament for the said borough of —, viz. G. H. C. B., S. C., esquire, and the petitioner; that at such election J. G. M., esquire, the portreeve of the said borough, presided and acted as returning officer, and a poll being demanded and granted by the said J. G. M., esquire, such poll was proceeded with on the eighth day of July, one thousand eight hundred and fifty-two, and at the close thereof the numbers were declared to be as follows, viz. for the said G. H. C. B., esquire, two hundred and twenty, for the said S. C., esquire, one hundred and sixty-nine, and for the petitioner one hundred and four, and thereupon the said G. H. C. B. and the said S. C. were declared to have had a majority of votes at the said election, and to have been duly elected, and were returned by the said J. G. M. notwithstanding,

* This was the petition on which one of the members for Tavistock was unseated in February, 1853, and the petitioner seated in his place. The case is referred to (ante, p. 556) and an abstract there given of this petition. It is here given at length, from its practical utility, and the care with which it is drawn.

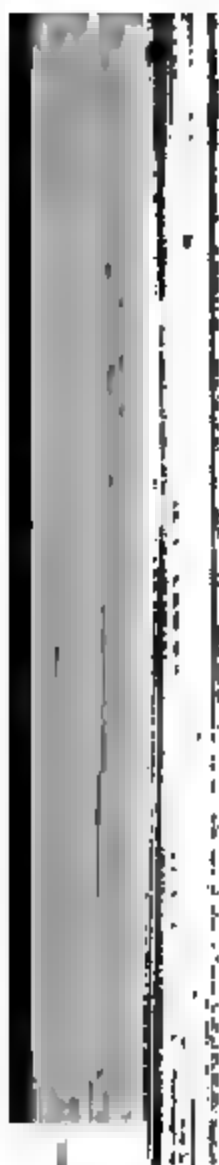
but subject to the protest of the petitioner, as hereinafter mentioned, as members duly elected to serve in this present parliament for the said borough of — ; that at the time of the said election of members to serve in this present parliament for the said borough of —, the said S. C. was not the eldest son or heir apparent of any peer or lord of parliament, or of any person qualified by the statute in that case made and provided to serve as knight of the shire, and that at the time of the said election the said S. C. was not seised or entitled for his own use and benefit of or to an estate legal or equitable, in lands, tenements, or hereditaments, of any tenure whatever, situate, lying, or being within the United Kingdom of Great Britain and Ireland, or in the rents and profits thereof, for his own life or for the life or lives of any other person or persons then living, or for a term of years either absolute or determinable on his own life or on the life or lives of any other person or persons then living, of which term not less than thirteen years were at the time of his said election unexpired, such estate being of the clear yearly value of not less than three hundred pounds over and above all incumbrances affecting the same, nor was he at the time of the said election possessed or entitled for his own use and benefit at law or in equity for his own life, or for the life or lives of any other person or persons then living, or for any term of years, either absolute or determinable on his own life, or for the life or lives of any other person or persons then living, of which term not less than thirteen years were at the time of the said election unexpired, of or to personal estate or effects of any nature or kind whatsoever situate within the said United Kingdom, nor of or to the interest, dividends, or annual proceeds of any such personal estate or effects, such personal estate or effects, interest, dividends, or annual proceeds, actually producing the clear yearly income of not less than three hundred pounds over and above all incumbrances affecting the same, nor did he at the time of his said election possess more than one of the said several kinds of qualification hereinbefore mentioned, which said several qualifications were jointly of sufficient value to qualify him the said S. C. as a member to serve in parliament for any borough, according to the provisions of the statute in that case made and provided, although each of such qualifications might, according to the said provisions, be separately insufficient for that purpose, and therefore that the said S. C. was not capable of being elected at the said election a member of the House for the said borough of —, and was not duly qualified as a member to serve in parliament for the said borough of —, and the said election and return of the said S. C. were and are wholly null and void ; that at the time of the said election the said S. C. was wholly ineligible and incapacitated to be elected as a member for the said borough, by reason that he the said S. C. was not, at the time of the said election, duly qualified by seisin or possession of real or personal estate or effects of such a nature, or to such amount, as was and is by law necessary to qualify him to sit and to be elected, and to render him the said S. C. capable of being elected a member of the House for the said borough, and for the want of such qualification, and of the incapacity last aforesaid, the election and return of the said S. C. were and are wholly null and

void; that on the seventh day of July, one thousand eight hundred and fifty-two, at the election of the said borough, immediately after a poll having been demanded by the petitioner, the said S. C. was duly required by the petitioner, a candidate at such election, to make and subscribe a declaration of qualification required to be made, pursuant to the provisions of a certain act of parliament passed in the second year of the reign of her present Majesty, intituled "An Act to amend the Laws relating to Qualifications of Members to serve in Parliament;" and that on the morning following, that is to say, on the eighth day of July, one thousand eight hundred and fifty-two, and some time before the said poll had commenced, due notice was publicly given to the electors of the said borough of —, that the qualification of the said S. C. to sit as a member of parliament required by the said last-mentioned Act had been duly questioned, and would be impeached before a committee of the House, and therefore that all votes given to the said S. C. would be thrown away, and the said voters were cautioned to inform themselves of the validity of the said S. C.'s qualification before they voted; that on the evening of the said seventh day of July, and on the morning of the said eighth day of July, and before the said poll had commenced, a notice or hand bill was circulated, published, and posted, in the said borough of —, by the said S. C., esquire, or by his committee and agents, of which the following is a copy, "Mr. P.'s last effort." "Mr. C.'s qualification having been questioned by Mr. P., Mr. C. hereby positively assures the electors that his qualification was regularly deposited in the Crown Office previous to his taking his seat in the House of Commons, and is ready to be exhibited to any one who has a right to demand it. —, July 8th, 1852;" that before the poll commenced on the morning of the said eighth of July, the said S. C. himself read aloud, in the Guildhall at — aforesaid, where the polling was to take place, the aforesaid notice or hand bill, so published by him or on his behalf, and then also handed to the said portreeve and returning officer the said hand bill, and also a declaration, of which the following is a copy: "I, S. C., do solemnly and sincerely declare that I am, to the best of my knowledge and belief, duly qualified to be elected as a member of the House of Commons according to the true intent and meaning of the Act passed in the second year of the reign of Queen Victoria, intituled 'An Act to amend the Laws relating to the Qualification of Members to serve in Parliament,' and that my qualification to be so elected doth arise out of leasehold houses and tenements, annuities and shares in joint stock companies, monies, goods, and chattels, as hereunder set forth, leasehold houses, tenements, tan-yard and premises in the parish of —, of which not less than thirteen years are unexpired,' 'an annuity in the — — Ton-tine,' 'shares in the — — Gas Company,' 'an annuity for life secured by deed, monies, goods and chattels in — and —,' S. C., July 7th, 1852;" that the said poll having commenced, due notice was given on behalf of the petitioner to several electors who first tendered their votes for the said S. C., that the qualification of the said S. C. had been duly questioned, and would be impeached before a committee of the House, and they were severally personally cautioned to

inform themselves of the validity of the said S. C.'s qualification before they gave him their votes, and that if they gave their votes for the said S. C., such votes would be thrown away; and that thereupon a discussion took place between the petitioner and his solicitor, with the said S. C., and the said portreeve, and all parties agreed, and especially the said S. C., that such notice or caution should not be personally repeated to each elector, but that the same should be understood to have been given to each elector throughout the election; that printed notices of the said S. C.'s want of qualification as aforesaid were affixed on each side of the door of the said Guildhall, in which, as aforesaid, the polling was carried on some time before the poll commenced, so as to be visible to every elector, as he came up to vote, and continued so affixed up to the close of the poll, and such notices were also, and at the same time, affixed to the hustings, which were close to the said Guildhall, and on other conspicuous places in the said borough, and continued so affixed up to the close of the poll, and for some days afterwards, and that the said notice and warning was well known and notorious to all the electors of the said borough of—— both before and during the time of the said election; that at the time of the election and return of the said S. C., and of his making the said declaration as last aforesaid, the said S. C. was not so seised or entitled, either at law or in equity, and had not such an estate for his own use and benefit in or to the leasehold houses, tenements, tan-yard, and premises, situate as in the said declaration is mentioned, nor in or to such annuities, monies, goods, and chattels, situate, arising, and being as in the said declaration is mentioned, nor was he so entitled or possessed for his own use and benefit to such leasehold houses, tenements, tan-yard, and premises, situate as in the said declaration is mentioned, nor in or to such annuities, monies, goods, and chattels, situate, arising, and being as in the said declaration is mentioned, as would qualify him the said S. C. to be elected as a member of the House for the said borough of——, according to the true intent and meaning of the said Act, intituled “An Act to amend the Laws relating to the Qualification of Members to serve in Parliament;” that the qualification arising out of the leasehold houses, tenements, tan-yard, and premises, annuities, monies, goods, and chattels mentioned in the said declaration, was insufficient to qualify the said S. C. as a member to serve in parliament for the said borough, and that the said S. C. was not at the time of his said election and return, by reason of his said want of qualification, capable of being elected a member for the said borough, and was not qualified as a member to serve in parliament for the said borough, and that the election and return of the said S. C. were and are thereby null and void; that upon the state of the poll being about to be declared, and before the said portreeve and returning officer made such declaration, the petitioner objected thereto, and protested against the said S. C., esquire, being returned by the said portreeve as one of the members for the said borough, by reason of the said S. C. not being entitled to be so returned for want of being duly qualified to be elected as a member of the House, and that the said portreeve therefore declared to the electors of the said borough that the said S. C.

was elected, subject to the petitioner's said protest; that on the following morning, viz. the ninth day of July, one thousand eight hundred and fifty-two, the petitioner continued his said protest by writing and delivering to the said portreeve a letter, of which the following is a copy:—" —, July 9th, 1852. To J. G. M., Esq. Sir,—I request you will be pleased, in making your return of the members elected yesterday for this borough, to notice specially the fact of my protest against Mr. C.'s qualification, and that you made the declaration of his being returned one of the members by stating it to be subject to my objection against Mr. C.'s qualification, and the defects in his declaration thereof, delivered by him to you. I am, Sir, your most obed^t S^t, R. J. P." And that such letter was forwarded by the said portreeve, appended to the return made by him to the sheriff of the said county of — of the election of members of the said borough of —; that the said portreeve and returning officer for the said borough of — duly certified the making of the said declaration by the said S. C., esquire, as aforesaid, to and before him the said portreeve on the eighth day of July, one thousand eight hundred and fifty-two, to the High Court of Chancery, where the same now remains of record; that the said declaration so made as aforesaid by the said S. C. was and is vague and uncertain, and did not and does not sufficiently state the nature of the qualification of the said S. C., and the particulars of the same as required by the provisions of the said act, and that the said declaration is defective and insufficient, inasmuch as it does not state for whose life or how secured the said — Tontine was, nor did it state upon what security or securities the annuity mentioned in the said declaration as being for life and secured by deed is vested, or in whose name or names the same is vested, nor what interest the said S. C. has in the monies, goods, and chattels mentioned in the said declaration, nor the amount of any of the said alleged sources of qualification as declared by the said S. C., or any other matter by means of which the nature and character of the same annuity, monies, goods, and chattels, or the amount of the said alleged sources of qualification could or can be ascertained, and that the said S. C. did thereby wilfully refuse and neglect to make and subscribe, within twenty-four hours after the said request of the petitioner, such a declaration as is required by the said last-mentioned act of parliament, and therefore that the said election and return of the said S. C. were and are null and void, and that the votes given at the said election for the said S. C. were thrown away; that the petitioner has been informed and verily believes that the declaration of qualification delivered in by the said S. C., esquire, at the table of the House, since the said election for the said borough of —, is other than and different from the declaration of qualification made by him at the said election as aforesaid; that the petitioner ought, by reason of the premises, to have been returned as duly elected at such election to serve in this present parliament for the said borough of — instead of the said S. C.—Prayer, that the House will be pleased to take the premises into their consideration, and will declare the said S. C., esquire, was not duly elected at the said last election as a member for the said borough of —, and ought not to

have been returned thereat, but that the petitioner was duly elected as such member, and ought to have been returned as one of the members to serve in this present parliament for the said borough, and will order and direct that the return of the said S. C., so made by the said portreeve and returning officer, be amended by erasing the name of the said S. C. therefrom, and by inserting therein the name of the petitioner, or that the House will declare the said last election for the said borough to have been wholly null and void so far as regards the election and return of the said S. C.; and that the House may make such further order and give such further relief in the premises as the House shall think fit, and the nature and merits of the case may require.



SUPPLEMENTAL
DIGEST OF DECISIONS

BY

THE COURT OF COMMON PLEAS AT WESTMINSTER

ON

ELECTION LAW,

PURSUANT TO STATUTE 6 VICT. c. 18,

IN MICHAELMAS TERM, 1852.

[Continued from the Chronological List of Decisions, at p. 396, A].

[NOTE.—It is very satisfactory to find that the Registration of England and Wales in the year 1852, though keenly contested, afforded only ten cases of appeal from the decisions of the revising barristers—seven of which were affirmed, one was reversed, on a difficult point of law (*Barrow v. Buckmaster*), and two were withdrawn. This clearly indicates that almost all the leading doctrines respecting the elective franchise, are now well settled.]

Stat. 8 Hen. 6, c. 7 [see ante, p. 366, A].

In computing the annual value of premises as a qualification to vote, the amount of the landlord's repairs must be deducted from the rent, under 8 Hen. 6, c. 7. *Hamilton v. Bass*, Leg. Obs. vol. 45, No. 1293; S. C. 22 Law Journ. N. S. 29. (C. P.)

Under a local Inclosure Act, the freemen of Leicester were entitled to hold the allotments of commonable land so long as they should think fit, provided they paid the rent and obeyed the rules and regulations of the deputies in whom the land was vested in trust for them. *Held*, dismissing with costs an appeal from the revising barrister, that the holders of such allotments were entitled to be registered as freeholders for the county. *Beeson v. Burton*, Leg. Obs. Vol. 45, No. 1290; S. C. 22 Law Journ. N. S. 33. (C. P.)

A chief rent can, for the purpose of registration, be *apportioned*, so that a relative or proportionate part only may be

Stat. 8 Hen. 6, c. 7—continued.

considered as a charge upon the piece of land for which a vote is claimed; the person who conveyed the piece of land, and the conveyee, having agreed between themselves to apportion it, but without the assent of the owner of the rent. *Seem*, also, that the chief rent would be equally apportionable without any such agreement.

The appellants claimed to be entitled in respect of undivided shares of two freehold houses. The site of them formed part of a plot of land, which on the 31st of *July* last was, and still remained, charged with and liable to a chief-rent of 14*l.* 1*s.* 7*d.* payable out of the same to an original grantor, with the usual power of distress. The fee-simple of the plot of land, subject to the chief-rent above-mentioned, became vested in *Charles Duffield* and two others, who granted that portion of it upon which the two houses stood, in fee-simple, to the parties claiming to vote and others, to the number of ten altogether, as tenants in common.

The deed by which such grant was made, recited that the said *Charles Duffield* and the other two were seised of the fee-simple of the land on which the two houses stood, "subject, nevertheless, with the other adjoining hereditaments, messuages, and premises now belonging to the said conveying parties, to a perpetual yearly rent of 14*l.* 1*s.* 7*d.*." The deed then went on to grant the land on which the two houses stood, to the parties above named, "subject only to a proportion, namely "the sum of 4*l.* 5*s.*, of the said yearly rent." The conveying parties then covenanted to pay the remainder of the said chief-rent of 14*l.* 1*s.* 7*d.*, namely the sum of 9*l.* 16*s.* 7*d.*, and to keep the grantees indemnified against all losses, damages, expenses, and proceedings which might arise by reason of the non-payment of the said 9*l.* 16*s.* 7*d.*; and further covenanted, that, if default should be made in the payment of the said 9*l.* 16*s.* 7*d.*, or any part thereof, and the grantees should be required to pay the same, or any part thereof, that thereupon it should be lawful for the grantees to enter and distrain for so much as should have been required to be paid, upon the remainder of the said plot of land. The grantees then covenanted with the grantors, in a similar manner, that they would pay their proportion of the said chief-rent of 14*l.* 1*s.* 7*d.*, namely the sum of 4*l.* 5*s.*; and gave a similar indemnity and power of distress, in case of default made.

The objection made to these parties, was, that their freehold share of the two houses was not of the requisite value to confer a vote.

If, for the purpose of conferring a vote, the annual value of the houses was to be calculated after deducting any further portion of the original chief-rent charged and payable as aforesaid, than the sum of 4*l.* 5*s.*, being the proportion above-named, the value of the houses *would not* be sufficient to confer a vote on the parties. If no further portion of the original chief-rent than the said sum of 4*l.* 5*s.* was to be taken into account, by

Stat. 8 Hen. 6, c. 7—continued.

way of deduction, in ascertaining the value of the houses, and the houses to be considered for that purpose as liable only to the payment of the said sum of 4*l.* 5*s.*, the value of the houses *would* be sufficient to confer a vote on the several parties named in the case.

The revising barrister decided, that, as the land on which the houses stood, was still liable, in conjunction with the rest of the plot, to the whole chief-rent of 14*l.* 1*s.* 7*d.*, though the parties had a collateral indemnity against the payment of more than the above-mentioned portion of it, the value was insufficient; and he disallowed the votes, and removed the names from the register.

Byles, Serjt. (*Aspland* was with him), for the appellants, submitted, that the case did not differ from that of a mortgage, and that the decision of the revising barrister was wrong: and he cited the 8 H. 6, c. 7, 10 H. 6, c. 2, 18 G. 2, c. 18, s. 5, *Curtis v. Spitty**, Story's Equity Jurisprudence†, *Anonymous*‡, *The Middlesex Case*§, Elliott on Registration, 2nd edit. 84, Shepherd on Elections, 2nd edit. 17, and *Lee*, app., *Hutchinson*, resp.||

Cowling, *contra*, contended, that, construing the statute 8 H. 6, c. 7, as it would have been construed at the time it passed,—when real property was the principal source of revenue,—the circumstances disclosed in the case showed that the claimants were not possessed of 40*s.* by the year “above all charges;” that the owner of the rent-charge might distrain for the whole rent upon this particular plot of land; and that the court could not take notice of the covenant of indemnity. He cited Gilbert on Rents, 154, Heywood on County Elections, 61, 62, *The Middlesex Case*¶, and he contended that the cases of mortgages depended upon the statute 7 & 8 W. 3, c. 25, s. 7.

*The Court*** reversed the decision of the revising barrister; holding that the sum legally and properly to be deducted from the value of the land in the hands of the claimants was 4*l.* 5*s.* only, and not 14*l.* 1*s.* 7*d.*, the amount of the original rent-charge, and that the case was in principle governed by *Lee*, app., *Hutchinson*, resp.

Barrow & others v. Buckmaster,†† 20th Nov. 1852.—Since reported 22 Law Journ. N. S. 65. (C.P.)

* 1 N. C. 756, 1 Scott, 737.

† 3rd edit. sect. 475, *et seq.*

‡ Cary's Rep. 3.

§ 2 Peckw. 103.

|| 8 C. B. 16, 2 Lutw. Reg. Cas. 160.

¶ 2 Peckw. 103.

** *Jervis*, C. J., *Maule*, J., *Williams*, J., and *Talfourd*, J.

†† This case is of such general importance, that it has been thought right to give the facts fully; the report was obligingly furnished by Mr. Scott, the learned reporter of the Court of Common Pleas.

Stat. 2 Will. 4, c. 45, s. 27 [see ante, p. 375, A]. Joining Cottage and Garden.

A. occupied a house and garden within a borough, taken by him of the same landlord at the same time, and at one entire rent. Though the house alone was not of the annual value of £10, the house and garden together were of that value; but they were entirely separated by waste land and a row of buildings. *Held*, that A. had a good qualification for a borough voter, within s. 27 of 2 Will. 4, c. 45, for that in the words "lands occupied *therewith*," "*therewith*" referred to time, and not to locality. *Collins v. Thomas*, Jurist, vol. 17, No. 837; S. C. 22 Law Journ. N. S. 38. (C. P.)

S. 32 [see ante, p. 380, A].

A., a freeman of the borough of Shrewsbury, paying scot and lot for upwards of two years last past, and down to the 25th March, 1851, occupied and resided in a house on the *Wylecop*, within the ancient and present limits of the borough; and since the 25th of March down to, and on the 31st of July, occupied and resided in a house at Coton Hill, without the ancient but within the present limits of the borough. The revising barrister, holding him to be disqualified by s. 32 of the 2 Will. 4, c. 45, expunged his name from the list of freemen voters. The court, without hearing any argument (the counsel for the respondent admitting that he could not support it), reversed the decision. *Jarvis v. Peele*, 11 C. B. 15 (M. T. 1851).

Stat. 6 & 7 Vict. c. 18, s. 7 [see ante, p. 384, A]. Lambert v. The Overseers of New Sarum, post, s. 101.

S. 17. The respondent claiming a vote for the city of C. received a notice of objection from the appellant, who described himself therein as "on the list of freemen for the city of C." It appeared that besides the list of freemen for the city entitled to vote for members of Parliament, there was a list called the freemen's roll, kept for municipal purposes. *Held*, that the revising barrister was right in deciding that the notice was sufficient under s. 17 of 6 & 7 Vict. c. 18, as affirming that the objector was on the list of freemen entitled to vote. *Feddon v. Sawyers*, Law Journ. N. S. Vol. 22, p. 15 (C. P.)

S. 42 [see ante, p. 389, A].

Where the case transmitted to the master under 6 & 7 Vict. c. 18, s. 42—64, is not *signed* as well as indorsed by the revising barrister, the court will not hear the appeal, unless the respondent consents to the case being remitted to him for signature. *Burton v. Brooks*, 11 C. B. 41 (M. T. 1851).^{*} See also *Burton v. Blake*, ib. 47.

^{*} This case is already reported, ante, pp. 389, A., 393, A.; but on a different point.

Stat. 6 & 7 Vict. c. 18, s. 42—continued.

The court adjourned the hearing of an appeal, in order to give the appellant time to give the notice required by the statute 6 & 7 Vict. c. 18, ss. 42—64, the case not having been settled and delivered to the appellant until the 8th day of term. *Burton v. Blake*, 11 C. B. 47. (M. T. 1851.)

S. 60 [see ante, p. 390, A].

The court refused to hear an appeal (or to allow it to stand over) where the appellant had failed, on the respondent's default to deliver copies of the case to the two junior puisne judges. *Sheldon v. Butt*, 11 C. B. 27. (M. T. 1851.)

The court, on motion of the appellant's counsel, reversed the decision of the revising barrister without argument, the respondent's counsel stating that he could not support the decision. *Jarvis v. Peele*, 11 C. B. 15. (M. T. 1851.)

S. 64 [see ante, p. 390-1, A] and s. 42, above.

S. 74 [see ante, p. 393-4, A].

J. S. claimed to vote in respect of a qualification consisting of land of the yearly value of £5. It appeared, however, it was mortgaged with other property of the annual value of £50, for £300, on which £15 a year interest was payable. Held, affirming the decision of the revising barrister, that the qualification was sufficient, the interest being apportionable rateably amongst the property. *Moore v. The Overseers of Carisbrooke*, Legal Obs. vol. 45, Nos. 1, 296.

S. 101. "Take notice that I object to your name being retained in the list of voters for the parish of St. Thomas, New Sarum, in the southern division of the county of Wilts." Held, a sufficient notice to the person addressed, of objection to his vote for the county, being "either to the like effect" as the form given within s. 7, or "so as to be commonly understood within s. 101 of stat. 6 Vict. c. 18." *Lambert v. The Overseers of New Sarum*, Jurist, vol. 17, No. 836; S. C. 22 Law Journ. N. S. 31. (C. P.)

Stat. 11 & 12 Vict. c. 90. By 11 & 12 Vict. c. 90, no person is entitled to be on any list of voters for any city, town or borough, unless the assessed taxes payable from him previously to the 5th January shall be paid on or before the 20th July following. By the 43 Geo. 3, c. 161, s. 23, the assessed taxes for the year are to be paid by quarterly instalments, on the 20th June, the 20th September, the 20th December, and the 20th March. By the 43 Geo. 3, c. 99, ss. 12, 33, the collectors are required to demand the sums assessed within ten days after they respectively shall become payable next after the assessments shall have been delivered to them; and if any person refuse to pay the sums charged upon him upon demand made by the collector, the collector is authorized to distrain. By the 48 Geo. 3, c. 141, No. 3, rule 3, the assessed taxes are directed to be collected and levied in half-yearly moieties before or within twenty-one days after the 10th October and the 5th April,

Stat. 11 & 12 Vict. c. 90—continued.

with a proviso that nothing in that act should be construed to alter the times and proportions at which the duties are payable according to the previous acts, or to affect the powers given thereby for the recovery of the said duties, which shall be deemed payable by quarterly instalments, at the times mentioned in the said acts. A claimant to a borough vote had not paid, on or before the 20th July, the quarter's house tax of the 20th December preceding, which was not, however, demanded till the 10th April. Held, that the quarter's tax was "payable previously to the 5th January," although no demand had then been made; and that the claimant was not entitled to be on the list of voters. *Ford v. Smedley*, Jurist, vol. 16, No. 835; S. C. 22 Law Journ. N. S. 35. (C. P.)

INDEX.

ABANDONING CHARGE OF BRIBERY,
487—494

ABDUCTION OF VOTER, 368

ABSENCE OF MEMBERS, 283, 284

ACCIDENTAL OMISSION FROM REGISTER, 359

ACT see BRIBERY ACTS.

the Grenville, 272

of Edw. 1, c. 5..410

the election petitions (1848), 275

when directory or not, 381

disobedience to, 380

implied repeal of, 588, note.

ACTION FOR COSTS, 657

ACTS, CONSTRUCTION OF, 523, 537

ACTS, COPIES OF, ADMISSIBLE, 584

ACTS OF AGENT,

binding on principal, 563, 566,
568, 578

ADJOURNMENT OF POLL, 400, 402,
et seq.

ADJOURNMENT OF PROCEEDINGS,
309, 638, 644.

ADMISSION,

by agent, 563

by principal, 564

ADVANTAGE, PROMISE FOR VOTERS,
427

ADULTERY, 586

AFFIDAVIT,

by surety, 293

no objection to be taken to, 297

not to be attached to petition, 315

of Irish voters being obstructed,
402

AFFINITY,

disqualification for committee, 282

payment to, bribery, 432, 444

AFFIRMATIVE WORDS IN STATUTE,
382

AGENCY, 560—580

implied or express, 561

distinction as to general or particular, 562, 569

proof of, 530, 563, 564, 573, 622

cases as to, 574, 575, 576

evidence of bribery before proof
of, 478, 481, *et seq.*

proof of, before evidence of treating, 531, 579

AGENT, 372, 562, 570

what is, 562

knowledge of, 419, note

bribery by, 426, 429, 443, 444,
447, 459

candidate responsible for, 458,
560, 563

witness, 488

treating by, 528 to 532, 535,
537, 540, 541, 579

general or particular, 562, 569

authority of, 563, 568, 570, 578

admission by, 563, 564

committee of candidate, 570, 572,
576

name of, to be handed in, 634

AGENT TO PROSECUTE BRIBERY
INQUIRY, 488

AGENT'S BRIBERY,

knowledge of, 448, 451, 480

AGENT'S TREATING,

knowledge of, 529, 537

AGREEMENT FOR REWARD, &c.,
427 to 430, 439, note, 443

AGREEMENT NOT TO PROSECUTE
PETITION, 488, 489

AGREEMENT TO TREAT, 525

ALDERMAN, 280

Y Y•

- ALIENAGE, 364**
- ALLEGATION OF BRIBERY IN PETITION,**
form of, 434, 445
- ALLEGATION OF TITLE OF PETITIONER, 335, 337, 338**
- ALLEGATION OF TREATING IN PETITION, 533, 536**
- ALLEGATION (UNFOUNDED),**
costs as to, 299, 650
- ALMS RECEIVING, 366**
- ALTERATIONS IN PETITION, 321,**
note.
- ALTERING MINUTES OF EVIDENCE, 633, 634**
- AMENDMENT OF LISTS, 639, 641**
- AMENDMENT OF RETURN, 646**
- ANNULLING ELECTION, 384, 385, 388, 392**
by intimidation, 369, 412, 417
by riot, 406, 419, note.
by insufficient notice of day of election, 421
by bribery, 424, 449, 455
by treating, 513, 517, 525
for want of qualification, 550, 551
- ANNULLING VOTE, 435**
- ANSWER,**
expunging, from minutes, 634
- APPEAL,**
from Irish assistant barristers, 349
from revising barristers, 341 to 349
from Scotch sheriff's courts, 350 to 357
- APPOINTMENT,**
bribing with an, 431
continuance of, presumed, 598
- ARCHES, DEAN OF THE, 280**
- ARMY CLOTHIER, 371**
- ASKING FOR BRIBE, 433, 439**
- ASKING FOR VOTE, 433, 436**
- ASSENT TO AGENT'S ACT, 459, 566, 579**
- ASSISTANT BARRISTERS (IRELAND),**
appeal from, 349
- ATHEIST, WITNESS, 587**
- ATHLONE CASE, 311, 319**
- ATTEMPT TO COMMIT BRIBERY, 446**
- ATTENDANCE OF WITNESS,**
how secured, 608, 609
- ATTORNEY, 372, 373**
- ATTORNEY-GENERAL, 280**
- AUTHENTICITY OF POLL-BOOKS, 623, 624**
- AVOIDING ELECTION. See ANNULLING ELECTION.**
- AYLESBURY PETITION CASE, 338**
- BANK RECEIPT, 291, 293, 296**
- BARRISTER, REVISING, 341**
appeal from, to Court of Common Pleas, 341
examination of, 342, 343
- BELFAST CASE, 303, note; 311, 325, 559**
- BELLINGERS, 372**
- BERWICK CASE, 312**
- BETTING BY VOTER, 377**
- BIRTHS, REGISTER OF, 624**
- BOLTON CASE, 575**
- BOOKS, PRODUCTION OF, 614**
- BOOTHs, EXPENSES FOR, 398, note.**
- BOROUGH VOTER, 360**
not continuing qualification, 363
residence, 363
- BRACKETING PETITIONS, 634**
- BRACKETING VOTERS,**
in lists of objections, 325
- BRIBE, ASKING FOR, 433, 439.**
- BRIBE, OFFER OF, 439**
- BRIBED VOTE, 374, 424, 429, 435**
- BRIBER, LIABILITIES OF, 429, 430, 441, 496**
- BRIBERS, LIST OF, 631**
- BRIBER'S VOTE, 376, 438, 439**

BRIBERY,
costs of petition, 300, 657
recognizance, 300
frivolous charges of, 300
petitioner disqualified from, 312
time for presenting petition, 315
petition complaining of, 329, 330
employments at election, 370 to 374
vote given by means of, 374, 424
evidence as to, 375, 436, 480 to 484
by treating, 376. See **TREATING**.
corrupt practices comprehend, 376, note.
a common law offence, 423, 425, 427, 455
what is, 424, 426, 431 to 443
liabilities from, 429, 441, 463, 496
offender discovering another offender, 429
definition of, 433, 444
form of allegation of, in petition, 434, 445
by one voter bribing another, 441
by candidate, 443 to 461, 485
report as to, by committees, 447 to 450, 465, 480, 488
evidence of at former election, 465, 468
proof of before agency, 478, 481, *et seq.*
disqualification by bribery at former election, 466, 468
by petitioning candidate, 486
compromising charge of, 487 to 494
opening case of, 639

BRIBERY ACTS,
2 Geo. 2, c. 24..428, 443
49 Geo. 3, c. 118..429, 443
5 & 6 Vict. c. 102..431, 444, 487
7 Will. 3, c. 4..443, 455
4 & 5 Vict. c. 57..478, 479
15 & 16 Vict. c. 57..494

BRIBERY OATH, 428

BRIBING WITNESS, 611, note.

BRIDGEWATER CASE, 438

BURTHEN OF PROOF, 621

BYE-LAW, PROOF OF, 584

CABINET MINISTER, 280

CANDIDATE,
excused from serving on committee, 280
right to petition, 302, 306, 335
definition of, 307
when cannot petition, 313
allegation in petition, 336
who may propose, 389, 390, 393
proposing after day of nomination, 394 to 398
may vote for himself, 389
may demand the poll, 391
liability of, for expenses of booths, &c. 398, note.
elected against his will, 398
bribery by, 443, 447, 485
disabled from being re-elected, 449, 450, 513, 515, 517
responsible for acts of agent, 459, 560, 568
disqualified by bribery at former election, 466, 468
examined as to compromises, 488
treating by, 506, 524, 528 to 531, 535, 537, 540
disqualified by treating at former election, 517, 540
treating at the expense of, 535, 537, 541, 543
treating without the authority of, 529, 540, 541, 543
property qualification of, 549, 551, note, 552, *et seq.*
demanding qualification of, 550, 551, 553
when must be qualified, 554
proof of being, 622

CANTERBURY CASE, 311

CANVASSING,
evidence of agency, 574

CAPACITY FOR ELECTION PURPOSES, 370

CARLISLE CASE, 538

CARNARVON CASE, 310, 315, n.

CASTING VOTE
of chairman, 284

CERTIFICATE OF EXAMINER, 291,
et seq.

CERTIFICATE OF RECOGNIZANCE,
297

CERTIFICATE OF SEAT VACANT,
306

CERTIFICATE OF SPEAKER, 656, 657

CERTIFIED COPIES, EVIDENCE, 584

CHAIRMAN.

appointment of, 282, 284

casting vote, 284

summoning witness, 609, 618

power of, to commit, 609

CHAIRMAN OF QUARTER SESSIONS.
WITNESS, 343

CHAIRMAN'S PANEL, 280

appointment of chairman of select committee, 282

CHARGES.

not agreed, 428

CHECK CLERK, 372

CHELTENHAM CASE, 467

CHISHIRE NORTH CASE, 576

CHESTER CASE, 337

CHILD WITNESS, 587

CHRISTMAS-DAY, 295

CIRCUMSTANTIAL PROOF, 607, 608

CLAIM.

appeal in respect of, 346

——— *SCOTCH*

admitted or rejected by sheriff, 351

notice to give in, 352

——— *TO RIGHT TO VOTE,* 306

CLAIMANT TO BE ELECTED, 306

CLAIMS.

to be produced on appeal, 347

CLASSIFICATION OF PETITIONS, 315

CLERICAL ERROR, 321

CLERK OF GENERAL COMMITTEE,
309

list of objections to be delivered to, 324, 327

CLERK OF THE CROWN.

production of poll-books by, 623

CLERK OF THE HOUSE,

statement of qualifying property to be delivered to, 551

CLOSED DOORS, 284, 412

CLOSING POLL, 400 to 408

COACHMEN, 370

COERCING VOTES, 411

COMMISSIONERS

to take evidence in Ireland, 284, 646

COMMITTAL OF WITNESS, 285, 608, 611

COMMITTEE OF CANDIDATE, 570, 572, 573, 576

COMMITTEE ON ELECTIONS. See
GENERAL COMMITTEE, SELECT COMMITTEE

former constitution of, 271 to 275

present constitution of, 278 to 283

its duties, functions, 284 to 287

exemptions from serving on, 279

absence of members of, 284

dissolution of, 284, 286

power to send for papers, &c. 285

determination, final, 285

bound by decisions of court of
C. P. 348

decision of, not quotable, 348, 422

bound by decisions of Irish Ex-
chequer Chamber, 349

decisions of, conflicting, 420, 421

COMMITTEE ROOM,

ordering witnesses out of, 619, 620

COMMONS, HOUSE OF,

petition not addressed to, 322, 332
when will not receive a petition,
329

power to inquire into bribery, 336,
331

as to signatures being forged, 338

as to writ of summons 384

to examine election returns, 418

resolution of superseded by bribery
act, 426

committal of witness by, 611

cannot examine witness when com-
mittee formed, 618, 619

COMMON LAW,

bribery an offence at, 423, 427

disability at, from bribery, 455

treating not an offence at, 503

COMMON PLEAS, COURT OF, 341,
348

- COMPETENCY OF WITNESS**, 585, 586, 587, 590, 595, 596
- COMPLAINT IN PETITION**, 321, 328, 329
- COMPROMISE OF PETITION**, 487 to 494
- CONSENT TO AGENT'S BRIBERY**, 448, 451
- CONSPIRACY TO CORRUPT**, 419 n., 544
- CONSTRUCTION OF STATUTES**, 523, 537
- CONTINUANCE, PRESUMPTION OF**, 597
- CONTINUING QUALIFICATION**, 360 to 363
- CONTINUING QUALIFICATION (IRELAND)**, 362
- CONTRACT FOR BRIBERY**, 428 to 431
- CONVERSATIONS AS TO BRIBERY**, 482 to 484
- CONVICT VOTER**, 366
- CONVICT WITNESS**, 583, 587
- CONVICTED OF BRIBERY**, 435
effect of being, 429, 435
incapacity of candidate without being, 473, 474
- CONVICTION, PROOF OF**, 586
- CORK CASE**, 404, 558
- CORPORATION**, 312
- CORRUPT CONTRACT**, 428 to 431; 436
- CORRUPT ELECTION**,
costs, 299
complaint as to, 329, 544
- CORRUPT INFLUENCE**, 374, 424, 535, 537
- CORRUPT OR PROCURE**, 446, 464
penalty for, 429
- CORRUPT PRACTICES**, 374, 544
act to prevent, 370, 546
act to inquire into, 494
- CORRUPTION BY CANDIDATE**, 443, 444
when offence complete, 446, 464
penalty for, 429
- CORRUPTION OF VOTER'S MIND**, 440, 441
evidence of, 435 to 438
- CORRUPT TREATING**, 535, 537, *et seq.*
- COSTS**,
history as to, 647
when party entitled to, 650, 652
on objections, 295, 298, 299, 653, 654
payable by petitioner, 297, 298, 318, 647, 650, *et seq.*
when petition frivolous or vexatious, 298, 648, *et seq.*
when opposition frivolous or vexatious, 298, 649, *et seq.*
when election or return vexatious or corrupt, 299, 650
in case of an unfounded allegation, 299, 650, 655
as to ordering to be paid forthwith, 650 n.
on petition for bribery, 300
of erecting booths, &c. 398 n.
of proceedings under 5 & 6 Vict. c. 102, 492
application for, 654
time for asking for, 631, 655
statutes as to, 649, 650
on withdrawing petition, 298, 653
from not giving notice of not defending return, 654
mode of ascertaining, 656
mode of enforcing payment of, 657
recovery of contribution, 657
- COSTS, SECURITY FOR**, 290
by payment into the bank, 291
by recognizance, 292
- COUNSEL**, 372, 634, 636
hearing on several petitions, 635
hearing on a scrutiny, 643
- COUNTY, TREATING**, 525
- COUNTY VOTER CONTINUING QUALIFICATION**, 361
- COURT OF COMMON PLEAS**, 341, 348
- COURT OF EXCHEQUER CHAMBER (IRELAND)**, 349
- COURT OF RECORD**, 343

- COURT OF REVIEW (SCOTLAND),**
354
- COVENTRY CASE,** 405, 438.
- CRIME, WITNESS CONVICTED OF,**
583
- CRIMINAL INFORMATION FOR BRIBERY,** 496
- CRIMINAL PROCEEDINGS,**
party to, witness, 586
- CRIMINATING QUESTION,**
witness answering, 586, 592, 593,
594, 612, 613
- CROSS EXAMINATION,** 603
- DAWSON'S CASE,** 360
- DEATH OF MEMBER,** 284, 308
- DEATH OF PETITIONER,** 310
- DEATH OF SURETY,** 295, 296
- DEATHS, REGISTER OF,** 624
- DEBATE (PARLIAMENTARY),**
no reference to, 315
- DECISIONS OF COMMITTEE,**
quoting as authority, 348, 349
conflicting, 421
evidence, grounds of, 422
- DECISION OF RETURNING OFFICER,**
393
- DECISION OF REVISING BARRISTER,**
appeal from, 342, *et seq.*, 364
evidence of, 342—345, 347
- DECLARATION,**
form of, for costs, 657
- DECLARATION AS TO QUALIFICATION,**
to be made by candidate, 551
to be accurate, 552
requisites of, 552, 553
refusal to subscribe, 553
words of the, 554, 555
- DECLARATION OF AGENT,**
binding on principal, 563, 564
- DECLARATION OF TRADER,** 600
- DECLARATION OF WITNESS,** 599
- DECLARATIONS OF PERSONS,**
admissible as to bribery, 482
- DEFINITION OF BRIBERY,** 433
- DEMAND OF POLL,** 391, 392
- DEPUTY SHERIFF VOTING,** 373
- DERBY PETITION CASE,** 329
- DESCRIPTION OF SURETY,** 292, 297
- DESCRIPTION OF VOTER,** 324, 325
- DETENTION OF VOTER,** 369
- DIRECTORY STATUTE,** 381
- DISABILITY TO BE RE-ELECTED,**
449—457, 463, 496, 507, 509,
515, 532
notice of, to electors, 466
- DISCHARGE OF OFFENDER FOR BRIBERY,** 429
- DISQUALIFICATION,**
for serving on committees, 279,
280, 282
of petitioner, 312, 313
subsequent to register, 366
by accepting election employ-
ments, 370
by bribery, 429, 439, 449, 496
evidence of, 468, 469
from felony, 473
from treating, 507, 509, 513, 515,
517, 525, 532, 536
from want of property, 549, *et*
seq.
of returning officer, 388
- DISQUALIFIED CANDIDATE, VOTING FOR,** 475
- DISQUALIFYING OFFICE,** 366, 370
accepting subsequent to register,
366
- DISSOLUTION OF COMMITTEE,** 284,
286, 318
- DISTURBANCE TO FREE ELECTION,**
409
act of Edward I. against, 410
by intimidation, 412
- DOCUMENTS,**
not to be annexed to petition,
315
what required before committee,
347
proof of, 583, 584, 587, 624
search for, 599
evidence of contents of, 599
cross examining as to contents of,
604

DOCUMENTS, PRODUCTION OF, 285, 347, 594, 614—618

DOUBLE RETURNS, 315, 636

DRINK, 376, 426, 456, 502, 519, 525, 526, 535

DRUNKARD, WITNESS, 587

DUBLIN CASE, 30, 368, 413

ELECTED, DISABILITY TO BE, 449, *et seq.*

ELECTED, TREATING IN ORDER TO BE, 518, 526

ELECTION,
 member not defending, 308
 member, trying merits of, 311, 315, note
 intimidation annulling, 369
 employments at, 370—374
 irregularities affecting, 380—385, 394
 before first election avoided, 385
 not opening or closing polls at right hours, 399, 400
 in case of riots at, 402, 404, *et seq.*
 freedom of, 409, 410
 void from intimidation, 412
 void from bribery, 424, 449, 455
 gifts for procuring, 427—431
 disability on such, 451, *et seq.*
 trying merits of a former, 468, 470
 void from treating, 517, 522, 525, 536
 proving void, after admission, 645
 correcting return as to result of, 646

ELECTION COMMITTEE. See **GENERAL COMMITTEE, SELECT COMMITTEE**,
 former constitution of, 271—275
 present constitution of, 278—285
 its functions, 285—287
 members excused from serving on, 279
 absence of members of, 284
 dissolution of, 284, 286
 power to send for papers, &c., 285

ELECTION COMMITTEE—continued
 determination, final, 285
 bound by decisions of Common Pleas, 348
 decisions not quotable, 348, 422
 bound by decisions of Irish Exchequer Chamber, 349
 decisions of, conflicting, 420, 421

ELECTION PETITION,
 referred to general committee, 279, 328, 334, note, 634
 referred to select committee, 284, 328, 634
 person signing, may be examined, 285
 trial of, 286
 jurisdiction to try, 328, *et seq.*
 withdrawing, 298, 318
 costs, when frivolous or vexatious, 298, 648, *et seq.*
 what deemed an, 301, 302, 329, 330
 subscribed, 302, 314, 315
 grounds of, 302
 voter opposing, 309, 635
 disqualification of petitioner, 312
 presentment to the House of, 314, 315, 489
 standing orders on, 314
 form of, 319—322
 interlineations, in, 321, n.
 inquiry by the House pending an, 330, 331
 signatures to, 332, 338, 636
 objections to, 319—322, 636, 637
 form of allegation of bribery in an, 434, 445
 compromised, 487—494
 at the costs of strangers, 637
 inquiry into, though presented after time, 489
 former petition used as evidence of treating at former election, 511
 form of allegation of treating in, 533, 536
 on ground of want of qualification, 556

ELECTION PETITIONS,
 list of, 296, 634
 classification of, 315
 order of taking, 634, 635
 hearing counsel, where several, 635

ELECTION PETITIONS' ACT, 1848,
275

ELECTION UNDUE, 303

ELECTION, VEXATIOUS OR CORRUPT,
299

**ELECTION VOID. See ANNULLING
ELECTION**

ELECTION, WRIT OF,
treating after teste of, 524

ELECTOR. See VOTER.

**EMPLOYED FOR ELECTION PUR-
POSES, 370—374**

EMPLOYMENT TO VOTER, 427—431,
444

ENGAGEMENT TO GIVE MONEY, 427

ENGAGEMENT TO TREAT, 525

ENGLISH, PETITION IN, 314

ENTERTAINMENT, 376, 426, 502,
507, 518—526, 535

ENTRY IN REGISTER, 584, 625,
626

ERASURE, 321, n.

ERROR. See MISTAKE
in petition, 321
in writ of summons, 384

ESTOPPEL, 312, 313, 468

ESTREATING RECOGNIZANCES, 657

EVESHAM CASE, 425

**EVIDENCE, 285, 286; and see WIT-
NESS**

confined to list of objections, 324,
327

of signature of petitioner, 332,
338

of title of petitioner, 337

of qualification of voter, 341, 360,
361

of decision of revising barrister,
342—345

on appeal, 346

documents required, 347

of tendered vote, 347

of corrupt influence, 375

as to riot affecting election, 404
—409

as to intimidation, 412, 415, 419, n.

EVIDENCE—continued,

of grounds of decision, 422

of corruption of voter's mind, 435
—438

of bribery at the former election,
465, 468, 511

proof of bribery, 478, 481—484

of compromising charges of bri-
bery, 487—494

of treating at former election, 511

of treating being in order to be
elected, 519—522, 527

of agency, 530, 531, 540, 541,
563, 573, *et seq.*

of corrupt treating, 537, 538

onus on petitioners to impeach
member's qualification, 553

declarations of agent, 563—565

former law as to competency, 581

statutes removing restrictions on,
582—585

proof of documentary, 583, 584,
586, 624

proof of judge's signature, 584

persons now competent to give,
585, 587, 590, 595

of interested witnesses before
committees, 587—591

competency of petitioners and
members, 591

competency of voters, 595, 596

as to answering questions tending
to criminate witness, 592—
595, 612, 613

the like to disgrace him, 595

presumption of continuance, 579

no different rules of, 598

giving the best, 598

secondary, 599, 616, 618

hearsay, 599

examination as to witness's me-
moranda, 602

contradicting party's own wit-
ness, 603

of character of witness, 605, 606

circumstantial, 607

witness prevaricating or refusing
to give, 610, 611

witness giving false, 610, 611

must be limited to the case open-
ed, 621, 631, 638

burthen of proof, 621

of personation, 621

of election, 622

of authenticity of poll-books, 623,
624

EVIDENCE—continued
of official registers and entries therein, 624, 625, 626
as to identity of persons, 625
minutes of, 633, 634
of election void, although admitted, 645
commissioners for taking, 286, 646
speaker's certificate, 656, 657

EXAMINATION OF WITNESS, 600

EXAMINER OF RECOGNIZANCES,
certificate by, 291
how appointed, 292
recognizance to be delivered to, 293
entry by, 293
delivery to, of objections to recognizance, 295
hearing of objections by, 295
report by, 296, 656
witness giving false evidence before, 611
power of, to award costs, 653
taxation of costs by, 656

EXCESSIVE AND EXORBITANT EXPENSE,
undue election by, 507, 519—521, 524

EXCHEQUER CHAMBER (IRELAND) 349

EXCOMMUNICATION, THREAT OF, 413

EXCUSE,
for serving on committee, 279
for absence, 284
for not presenting petition in time, 316

EXEMPTION,
from serving on committee, 278

EXPENSES, see COSTS,
act against, 428, 506, 524, 535
of treating, 535 to 543
witnesses right to be paid, 610
fund subscribed for petition, 637
of witnesses, 658

EXPENSES, SECURITY FOR, 290
by payment into the Bank, 291
by recognizance, 292

EXPRESS DECISION OF REVISING BARRISTER, 342

EXPUNGED NAME OF VOTER, 342

EXTRA GLUT TIDE WAITER, 349

FACTS, IGNORANCE OF, 312

FEAR INFLUENCING VOTERS, 405 n. 411 *et seq.*

FEE,
voter accepting, 373

FELON, 366

FEMALE, 364

FINALLY CLOSING THE POLL, 400, 402, *et seq.*

FLAGMAN, 372

FORBEARING TO VOTE, 428, 432

FORCIBLY PREVENTED FROM POLLING, 368, 400, 402, *et seq.*

FOREIGN SERVICE,
excuse for serving on committees, 280

FORGERY OF SIGNATURE, 338, 339

FORM OF ALLEGATION OF BRIBERY,
in petition, 434
in list of objections, 434

FORM OF ALLEGATION OF TREATING,
in petition, 533, 536

FORM OF NOTICE TO ELECTORS,
of disqualification of bribery, 466

FORM OF PETITION, 319 to 322

FRAUD, IN EXCLUSION FROM REGISTER, 359

FREEDOM OF ELECTION, 409, 416

FRIVOLOUS OBJECTION,
costs, 299

FRIVOLOUS OPPOSITION,
costs, 298, 649, *et seq.*

FRIVOLOUS PETITION,
costs, 298, 648, *et seq.*

GENERAL AGENT, 562, 569

GENERAL COMMITTEE, 278, 282, 309, 634

GIFT, 426, 428 to 431; 443, 444, 507

- GOOD FRIDAY, 295**
GOVERNMENT CONTRACTOR, 371
GOVERNMENT OFFICE,
 accepting subsequent to register, 366
GRAND JURY, 280
GREAT YARMOUTH CASE, 574
GRENVILLE ACT, THE, 272, 587
GROUND OF DECISION, 344, 422
GROUND OF OBJECTION, 296, 346
GROUND OF PETITION, 302
HANDS, SHOW OF BY NON-ELECTORS, 389
HARWICH CASE, 338, 342, 344, 345, 405
HEAD MONEY, 432
HEADING OF PETITION,
 objection to, 322, 332
HEADS OF OBJECTIONS, 323, 324
 repeating, 326
HEARSAY EVIDENCE, 599, 600
HEREFORDSHIRE CASE, 312, 518
HESITATION,
 witness committed for, 611
HINDON CASE, 458
HORSHAM CASE, 468, 469, 575
HOUSE OF COMMONS,
 petition not addressed to, 322, 332
 when will not receive a petition, 329
 jurisdiction of, to take evidence 619
 jurisdiction of, to inquire into bribery, 330, 331
 as to signatures being forged, 338
 jurisdiction over the writ of summons, 384
 power to examine election returns, 417, 418
 resolution of, superseded by Bribery Act, 426
 no power to examine witness when committee formed, 618
HOUSEHOLDERS, PETITION FROM, 330
- HUSBAND AND WIFE, 586**
IDENTITY,
 of persons mentioned in registers, 626
IDIOT WITNESS, 587
IDIOTCY, 364
IGNORANCE, 312, 316
ILCHESTER CASE, 417, 544 n.
IMPERATIVE STATUTE, 381, 382, 384
IMPRISONMENT OF VOTER, 369
IN ORDER TO BE ELECTED, TREATING, 519, 521, 525, 526
INCAPACITATED BY BRIBERY, 429, 430, 431, 496
INCAPACITATED BY TREATING, 507, 509, 525, 532
INCAPACITY, 363, 364, 429, 449 to 457, 496, 507, 509
INDICTMENT FOR BRIBERY, 496
INDICTMENT NO DISQUALIFICATION, 473
INDORSEMENT BY EXAMINER, 291
INFANCY, 364
INFLUENCE CORRUPT, 374, 424, 535
INHABITANT HOUSEHOLDERS, PETITION FROM, 330
INQUIRY,
 pending an election petition, 330
INSERTION OF VOTER'S NAME, 342
INSPECTION OF LIST OF OBJECTIONS, 327
INSPECTION OF PAPERS, &c. 614
INSPECTION OF RECOGNIZANCE, 293
INSPECTOR VOTING, 374
INTENTION TO CORRUPT, 519 to 521
INTERESTED WITNESS, see WITNESS
INTERFERENCE WITH FREE ELECTION, 416
INTERLINEATION, 321 n.
INTERRUPTION OF POLL, 400
INTIMIDATION TO VOTERS, 368, 409, et seq.

- INVERNESSHIRE CASE**, 355
- IPSWICH CASE**, 483
- IRELAND**,
 evidence taken in, 286
 appeal from assistant barristers of, 349
 qualification continuing, 362
 extension of treating acts to, 534
- IRISH BOROUGHs**,
 duration of poll in, 402
- IRISH COUNTIES**,
 duration of poll in, 402
- IRISH POLLS**,
 proof of, 627
- IRISH VOTERS OBSTRUCTED BY RIOT**, 402
- IRREGULARITY**,
 not affecting the result of the election, 380, 383, 394
 in the writ of summons, 384
 or nullity, 385
- JOURNALS OF HOUSE**, 635
 proof of copies of, 584
- JUDGE'S SIGNATURE, PROOF OF**, 584
- JUDGMENT OF SHERIFF (Scotland)**,
 appeal from, 352, 353
- JUDGMENT OF SHERIFF'S APPEAL COURTS**, 353
- JURAT**,
 no objection to, 297
- JURISDICTION**,
 to try petition, 319, 328, *et seq.* ; 358, *et seq.* ; 560
 of the House pending an election petition, 330, 619
 to inquire as to signatures to petition, 338
 to inquire as to right to vote, 328, 358, *et seq.*
 in issuing writ of summons, 384
 to examine election returns, 418
 not to usurp, 442
- JURISDICTION (Scotch votes)**,
 of Select Committee, 350 to 357
- JUSTICE OF THE PEACE**, 292, 293, 551
- KINDRED**,
 disqualification for serving on committee, 282
- KINDRED—continued**
 payment, &c. to, bribery, 432, 438, 444
- KNOWLEDGE OF AGENT'S BRIBERY**, 447 to 454
- KNOWLEDGE OF AGENT'S TREATING**, 528 to 531, 543
- KNOWLEDGE OF MEMBER**, 419, n.
- KNOWLEDGE PRESUMED**, 312
- LANCASTER CASE**, 611
- LANDS**,
 described in declaration of qualification, 553
- LAW**,
 appeal on points of, 341
- LAW, IGNORANCE OF**, 312
- LEADING QUESTIONS**, 601, 604
- LETTER CARRIER**, 325
- LETTERS**,
 not to be attached to petition, 315
- LINLITHGOWSHIRE CASE**, 354
- LIST OF BRIBED AND BRIBERS**, 631, 639, 610
- LIST OF ELECTION PETITIONS**, 296
- LIST OF OBJECTIONS.—See LIST OF VOTERS**
 form of allegation of bribery in, 434
- LIST OF PLACES AND TIMES OF TREATING**, 631, 640, 641
- LIST OF VOTERS**, 284, 309, 323
 objected to, 323, *et seq.*
 proposed to be added to, 323, 326
 to whom delivered, 324
 when to be delivered, 327
 no evidence against vote not included in, 324
 inspection of, 327
 when not required, 326
 production of, before committee, 347
- LOAN TO VOTERS**, 437
- LONDON CASE**, 576
- LONDON GAZETTE**, 308.
- LONG'S CASE, (NEW WINDSOR)**, 373

- LUNATIC**, 366
- MADMAN, WITNESS**, 587
- MAJORITY**,
determination by, 284, 285
- MARRIAGE, BREACH OF PROMISE OF**, 586
- MARRIAGES, REGISTER OF**, 624, 626
- MASTER OF THE ROLLS**, 280
- MEAT**, 376, 426, 456, 502, 519, 525, 526, 535
- MEMBER**,
petition signed by, 314
notice to, of withdrawing petition, 298, 318
cannot relinquish seat, 399, n.
statement and declaration by, as to his qualifying property, 551—553
voting before signing such declaration, 551.
refusal to subscribe the declaration, 553
excused and disqualified from serving on committees, 279, 280, 282.
no right to be present at committee, 619
dying after petition, 308
summoned as peer, 308
not defending return, 308, 635, 645, 654
questioning election, 311
proceeding with scrutiny although disqualified, 645
losing seat for bribery, 374, 424, 427, 430
knowledge of, 419, n., 447, 480
penalty on, for bribery, 429, 430, 431
bribery with consent of, 480
witness, 485, 488, 590, 591, 609
securing attendance of, as witness, 609
return of, how proved, 622
liability of, for costs, 650, 654
right of, to costs, 298, 648, 656
- MEMORANDA**,
witness referring to, 601, 602
- MEMORY OF WITNESS**,
refreshing, 601, 602
- MENACE OF THE CHURCH**, 411, 412
- MENACING VOTERS**, 410, 411, *et seq.*
- MESSENGERS**, 370, 371, 372, n.
- MINUTES**,
of proceedings before committee, 279, 511, 633
altering, 633, 634
- MISCARRIAGES AT ELECTION**, 383, 384
- MISDEMEANOR**, 362, 380, 392, 503, 551
- MISDESCRIPTION**,
in the recognizance, 297, 298
- MISTAKE**,
in excluding name from register, 359, 377
in recording votes, 377
correcting, 377, 378
in writ of summons, 384
- MISTAKES IN SCOTTISH REGISTER**,
correction of, 352
- MONEY**, 426, 428—432, 443, 444, 507, 519
- MONEY, LOAN OF**, 437
- MONTGOMERY CASE**, 370
- NAME OF VOTER**, 325
specially retained or inserted, 342
expressly expunged or omitted, 342
wrongfully excluded, 350
correction of register in respect of, 352, 358, *et seq.*
- NAMES OF BRIBERS AND VOTERS BRIBED**, 631, 639, 640
- NEGATIVE WORDS**,
imperative in a statute, 382
- NEGLIGENCE**,
in omitting name from register, 350
- NEWCASTLE - UNDER - LYNE CASE**, 450.
- NEWSPAPER NOTICE in, (SCOTCH)**, 352
- NEW WINDSOR CASE**, 347, 373, 486
- NOMINATION**,
by a stranger, 393
when candidate may be put in, 394—398
interrupted by riot, 400, 401

- NON-ELECTOR,**
 taking part in election, 389
 proposing candidate, 393
- NOTE OF SHERIFF'S DECISION,** 352
- NOTES OF REVISING BARRISTER,**
 343, n.
- NORWICH CASE,** 509, 511
- NOTICE,**
 of choosing select committee, 282, 309
 of petitions, 282
 to returning officer, 282
 to the members of committee, 283
 of withdrawing petition, 298, 318
 of seat vacant, 308
 of member not defending return, 308, 654
- NOTICE OF DAY OF ELECTION,**
 effect of an insufficient, 421
- NOTICE OF DISQUALIFICATION OF CANDIDATE,** 388, 466 to 475 ; 556 to 559
 form of, 466
 effect of, 475
- NOTICE OF OBJECTION,**
 to recognizance, 294 to 298
 grounds of objection in, 296
 in case of erroneous decision as to, 346
 to be produced on appeal, 347
- NOTICE TO GIVE IN CLAIMS (Scotch),** 352
- NOTICE TO GIVE IN OBJECTIONS (Scotch),** 352
- NOTICE TO PRODUCE,**
 legal effect of, 616
 since parties may be witnesses, 617, 618
- NOTTINGHAM CASE,** 339, 483, 490
- NULL AND VOID,** 382, n. ; 385
- NULLITIES AND IRREGULARITIES,** 386, n.
- NUMBER OF VOTER,**
 referred to in list of objections, 324, 325
- OATH,**
 candidate not taking qualification, 313, n. ; 399, n.
- OATH—continued.**
 to select committee, 283, 319
 against bribery, 428
 to shorthand writer, 633
- OBJECTION.**
 to members of select committee, 282, 283
 to recognizance, 294 to 298
 when notice of, to be delivered, 295
 hearing of, 295
 to affidavit, &c. 297
 to petition, 319 to 322 ; 636, 637
 before whom to be taken, 334
 when to be taken, 636
 to title of petitioner, 337 to 340 ; 637
- OBJECTIONS TO VOTERS,**
 lists of, 323, *et seq.*
 to whom delivered, 324
 when to be delivered, 327
 evidence confined to those specified, 324
 frivolous or vexatious, 299, 324
 form of allegation of bribery in, 434
 when not required, 326
 arising subsequent to register, 364, 365, 366
- OBJECTIONS TO VOTERS (Scotch),**
 notice to give in, 352
 inquiry into, by sheriff, 352
- OBSTRUCTION OF POLL,** 400, 402, *et seq.*
- OFFER OF BRIBE,** 439, 446, 464
- OFFICE,** 370, 444
 penalty for giving or accepting, 428 to 431
- OFFICIAL CAPACITIES,** 372
- OFFICIAL REGISTERS,** 624
- OMISSION OF VOTER'S NAME,** 342, 352
- ONUS OF PROOF,** 621
- OPENING POLL, TIME FOR,** 400 to 402
- OPPOSITION, FRIVOLOUS OR VEXATIOUS,** 298, 650
- ORDER OF HOUSE,**
 to issue warrant for persons, papers, and records, 608

ORDER OF READING PETITIONS,
314, 635

ORGANIZED INTIMIDATION, 411 to
419

PANELS, 281, 282—
see **CHAIRMAN'S PANEL.**

PAPERS,
power to send for, 285
warrant for, 608, 609, 614

PARISH CLERK, 372

PARLIAMENT, PROROGATION OF,
286, 317

PARLIAMENTARY DECISIONS, 348,
354

PAROCHIAL RELIEF, RECEIVING,
366, 367

PARTICULAR AGENT, 562, 578

PARTIES, WITNESSES, 585, 591, 595,
617, 619

PARTNERSHIP, CONTINUANCE OF,
598

PAYMENT,
for election employment, 373
deemed bribery, 431, 432, 444
of witnesses' expenses, 610

PEEBLESHIRE CASE, 356

PEER, MEMBER BECOMING, 308

PEER, PETITIONER BECOMING, 310,
311

PEER, VOTER, 366

PENALTY OF BRIBERY, 429 to 431 ;
460, n. ; 463, 496
how discharged from, 429
evidence in action for, 436

PENDING PETITION,
jurisdiction of the House, 330

PERJURY, 285, 611

PERSON NAMED IN RECOGNIZANCE,
297

PERSONAL ESTATE AND EFFECTS,
described in declaration of qua-
lification, 553

PERSONATED VOTER, 367

PERSONATION,
onus of proof of, 621
evidence as to, 621

PETITIONING CANDIDATE — See
CANDIDATE — PETITIONER.
evidence as to bribery by, 485
no petition against, 486

**PETITION. — See ELECTION PETI-
TION.**

powers of the House when not an
election, 302, 329, 330, 636
presentment of, to the House, 314
charging bribery presented after
the time, 489

PETITIONER, 302
security for costs by, 290
recognizance not joined in by, 292
taking copies of objection, 295
liability to costs, 297, 298, 318;
650, *et seq.*
who may be, 304—308, 335, 638
death of, 310
disqualified, 312, 313
when more than one, 313
withdrawing petition, 298, 318,
653
described, 335
proof of title of, 337
time for impugning title of, 339
witness, 485, 488, 590, 591
inquiry into character of, 636, 637
required to establish his majority,
645

PLACE, MISDESCRIPTION AS TO, 298
penalty for giving or accepting,
430, 431

PLACE, TREATING, 525

PLACE VACANT, TREATING AFTER,
524

POLL,
forcible detention from going to,
368
sheriff not keeping open, 383
who may demand, 391
waiver of, 391
refusal of, misdemeanor, 392
time for opening and closing, 399
—403
interruption of, by riot, &c., 400,
402, *et seq.*
premature closing of, 407
evidence of election, 622
authenticating, 622, 623, 627
correcting error in, 646

POLL BOOK

proof of who polled, 622
 when not sealed, 624
 proof of vote tendered, 347
 custody of, 623
 in case of loss of, 409, n., 624
 production and authenticity of, 623, 627

POLL CLERK, 372, 377, 378**POLLED, EVIDENCE OF HAVING, 622, 623****POLLING,**

voter making mistake in, 378
 when to commence, 395
 candidate proposed during, 394—398
 interrupted by riot, &c., 402, *et seq.*

POST BOYS, 370**PRACTICE, 629—646**

preliminary resolutions, 631
 short-hand writer, 633
 order of proceeding before committees, 636, 638, 641, 642, 644
 course of procedure on a scrutiny, 643, 645
 as to hearing counsel where several petitioners, 644, 645
 procedure where member withdraws, 645
 procedure where admitted election void, 645
 as to correcting errors in poll or return, 646
 mode of ascertaining costs, 656
 mode of enforcing payment of costs, 657

PRACTICE OF PAYING VOTERS, 432**PRAYER TO PETITION, 314, 321****PREFERMENT OF VOTER, 427****PRELIMINARY OBJECTION, 340****PRELIMINARY RESOLUTIONS, 631****PREMATURE CLOSING OF POLL, 407****PRESENT, 425, 426, 443, 507****PRESENTMENT OF PETITION, 314****PRESUMPTION OF CONTINUANCE, 597****PREVARICATION OF WITNESS, 610, 611****PRIESTS INFLUENCING VOTERS, 413****PRINCIPAL.—See AGENT.**

bound by acts, &c. of agent, 562, 563, 566, 568, 578

PRIVITY, 569**PROCURE OR CORRUPT, 446****PROCLAMATIONS, PROOF OF, 584**

PRODUCTION OF DOCUMENTS, 285, 347, 594, 614, 615, 616
 OF POLL BOOKS, 623, 627

PROHIBITORY STATUTE, 381**PROMISE OF ENTERTAINMENT, 525**

PROMISE OF PAYMENT,
 for election employment, 373, 427

PROMISE OF REWARD, 429, 430, 443, 444

PROPERTY QUALIFICATION OF MEMBER, 549

statement and declaration as to, 551, 552, *et seq.*
 situation of, 552

PROOF.—See EVIDENCE.

PROOF OF AGENCY, 481, 563, 573—580

PROPOSER OF CANDIDATE, 389, 393
 in Scotland, 390

PROROGATION,
 no dissolution of committee, 286, 318
 consequences of, 317

PROVISION, 502, 525, 526, 535

PUBLIC BOOK, PROOF OF, 587, 624

PUBLIC OFFICIAL CAPACITIES, 372

PUBLIC SERVICE,
 no excuse for serving on committees, 279

QUALIFICATION,
 register evidence of, 341, 358
 not continuing, 360—363

QUALIFICATION, CONTINUING (Ireland), 362

QUALIFICATION OATH,
 candidate not taking, 313, n., 362, 399, n.

QUALIFICATION, PROPERTY OF CANDIDATE,
 sufficiency of, 552

- QUALIFICATION, PROPERTY OF CANDIDATE—continued.**
 for counties, 549
 for boroughs, 549
 at the time of election, 550, 554
 demanding of candidate, 550, 551
 candidates exempt, 551, n.
 statement and declaration as to, 551, 555
 correct specification of, 552
 impeaching, 553, 621
- QUARTER SESSIONS, CHAIRMAN OF,**
 witness, 343
- QUESTION,**
 expunging, from minutes, 634
- RATIFICATION OF AGENTS' ACT,**
 459, 566, 579
- READING PETITIONS, 314**
- REASONABLE AND PROBABLE CAUSE,**
 651
- REASONABLE OR PROBABLE GROUND**
 652
- REASONABLE REQUEST,**
 to produce qualification, 553, 554
- RECEIVER OF BRIBE,**
 penalty on, 429, 430, 431
- RECOGNIZANCE, 291 to 300**
 who to join in, 292
 form of, 292, 297
 affidavit annexed to, 293
 exempt from stamp duty, 293
 inspection of, 293
 objections to, 294—298
 misdescription in, 297, 298
 on petition for bribery, 300
 estreating, 657
- RECOGNIZANCES—see EXAMINER OF RECOGNIZANCES.**
- RECORD, COURT OF, 343**
- RECORDS,**
 power to send for, 285
 warrant for, 608, 609, 614
- RECORDING VOTE,**
 mistake in, 378
- RECRIMINATING EVIDENCE, 485, 486**
- REFRESHMENTS TO VOTERS, 499, 500, 508, 518, 522, 547**
- REFUSAL TO MAKE DECLARATION OF QUALIFICATION, 553.**
- REFUSAL TO VOTE, 428, 432**
- REGISTER,**
 evidence of qualification, 341, 358
 appeal where name retained or inserted in, 342
 appeal where name expunged or omitted from, 342
 production of, 347
 finality of, 358
 name omitted from, 359
- REGISTER OF BIRTHS, &c., 624**
 proof of entries in, 625, 626
 identity of persons mentioned in, 625, 626
- REGISTER (SCOTTISH), 350, 352**
- REGISTERED ELECTOR,**
 petitioner described as, 335
 may nominate candidate, 390
- REGISTER NUMBER,**
 description of voter by, 324, 325
- RELATIVES,**
 corrupt practices with, 438
- RELATOR, 312**
- RELEVANCY OF EXAMINATION, 605**
- RENEWAL OF PETITION,**
 in case of prorogation obviated, 317
- REPORTS,**
 of select committees, 285, 286, 447, 449, 480, 488, 650
 of examiner, 296
- REQUEST TO MAKE DECLARATION OF QUALIFICATION, 553**
- RES GESTÆ, 482, 563, 565, 600**
- RES INTER ALIOS ACTA, 565**
- RESIDENCE, 363**
- RESIDENCE, ERROR IN SCOTTISH REGISTER, 352**
- RESPONDEAT SUPERIOR, 566**
- RESOLUTIONS OF COMMITTEES,**
 preliminary, 631
 on bribery, 448, 449, 465
 on treating, 513, 516, 517, 542, n.
- RESOLUTIONS OF HOUSE,**
 superseded by Bribery Act, 426
 against treating, 504

RESTRAINT AND INTIMIDATION, 411

RESULT OF ELECTION,
acts affecting, 380 to 384, 400 *et seq.*

RETAINING FEE,
voter accepting, 372, 373

RETENTION OF VOTER'S NAME, 342

RETURN.
when not defended by member,
308, 635
consequence of signing, 313
petitions relating to, 315, 328
petition against election, as well
as, 315, note, 646
agreement to procure, 444
when inquiry not to affect, 489
what is proved by writ and, 622
defended by electors, 635
amending error in, 646

RETURN, UNDUE, 303, 311

RETURN, VEXATIOUS OR CORRUPT,
299

RETURNING OFFICER, 303, 347, 386,
393
misconduct, 303, n. ; 392
notice to, of seat vacant, 308
voting, 372
disqualified from being candidate,
387
de facto, and not de jure, 387
refusing poll, 392
duty as to opening and closing
poll, 399, 400
duty of, in case of riot, 400, 402,
et seq.
bribing, 504
declaration as to qualification be-
fore, 551

REVENUE, IN THE COLLECTION OF,
description of voter, 325

REVISING BARRISTER, 341
appeal from, to Court of Common
Pleas, 341
appeal from to select committee,
342 *et seq.*, 364
express decision of, 342, 364
examination of, 342, 343, 344
proof of proceedings before, 342,
621

REWARD, 426 to 430, 443, 444, 507,
535

RIGHT TO PETITION, 304 to 308,
333, 335
allegations as to, 335 to 338

RIGHT TO VOTE,
petitioner to have a, 304, 333
proof of, 337, 341
pending an appeal, 341, n.
power of committee to inquire
into, 342, 345, 358 *et seq.*
lost by incapacity, 365, 366

RIOT, 400, 402 *et seq.*

ROMAN CATHOLIC CLERGY,
influencing election, 413

ROXBURGH CASE, 405

RUNNERS, 372, n.

SAID, 340

ST. ALBAN'S CASE, 322, 638

SCOTCH POLLS,
proof of, 627

SCOTLAND,
jurisdiction of committees on votes
in, 350 to 357
the Treating Act of Will. 3, ex-
tends to, 534

SCOTTISH BURGHS,
duration of poll in, 402

SCOTTISH COUNTIES,
duration of poll in, 401

SCOTTISH REGISTER, 350, 352

SCRUTINY, 328 to 378, 391, 643,
645

SEAT, WHEN NOT AFFECTED, 489

SECONDER OF CANDIDATE, 389, 393

SECONDARY EVIDENCE, 599, 616,
618, 624

SECURITY FOR REWARD, 429, 443

SELECT COMMITTEE, 281, 309
appointment of, 282, 630
chairman of, 282
objection to members of, 283
member excused, 283
swearing of, 283, 319
duties of, 284—287, 319, 597
report by, as to costs, 298, 299
to determine sufficiency of peti-
tion, 319, 334
original jurisdiction of, 328, *et*
seq., 358, *et seq.*
appellate jurisdiction of, 341, *et*
seq., 350, 351
decision of, not quotable, 348

SELECT COMMITTEE—continued.

bound by decision of Common Pleas, 348

jurisdiction of, in Scotch cases, 350, 351

conflicting decisions of, 421

reports as to bribery by, 447—450, 465, 480

to inquire into petition, compromising, 487, *et seq.*

examination of interested witness before, 587—591

distinction between a jury and a, 597

securing attendance of witnesses, &c. before, 608, 609, 614

committal of witness by, 611, 612

to determine if witness bound to answer question, 612, 613

witness can be examined only by, 618

ordering persons out of room, 619, 620

preliminary resolutions of, 631

to determine order of reading petitions, 634

order of proceeding before, 634, 636, 638, 641, 642

SERJEANT AT ARMS, 609, 611

SESSIONAL ORDERS, 314, 329

SEVERING DEFENCES, 644, 645

SHERIFF—see **RETURNING OFFICER**
guilty of irregularity, 380, 383, 392

when must grant poll, 391
voting, 372

SHERIFF'S APPEAL COURTS, 350, 353

SHERIFF, CLERK OF THE COUNTY,
production of poll books by, 627

SHERIFF (SCOTLAND), 350, 351, 352

SHORT-HAND WRITER, 284, 633

SHOW OF HANDS, 389, 391

SIGNATURES TO PETITION, 314, 332, 338, 636

SITTING MEMBER,
words in recognizance, 297

SLIGO CASE, 577

SOLICITOR, 373

SOLICITOR-GENERAL, 280

SOUTHAMPTON CASE, 483, 612

SOUTHWARK CASE, 315

SPEAKER,

notice by, of seat vacant, 308

notice by, of member not defending return, 308

notice to, of withdrawing petition, 298, 318

may nominate agent to prosecute bribery inquiry, 488

general order to, for issuing warrant to witnesses, 608

application to, for taxing costs, 656

SPEAKER'S CERTIFICATE,
for costs, 656

authenticating, 657

SPEAKER'S WARRANT,

appointing general committee, 278
for attendance of witness, 608, 609,

610, 614, 615

in case of disobedience to, 609

for production of papers, 614, 615, 618

service of, 618

SPECIAL COMMITTEE, 331, 332

SPECIFICATION OF QUALIFYING PROPERTY, 552

STAMP,

adjournment to obtain, 644

STAMP DUTY,

recognizances exempt from, 293

STANDING ORDER AGAINST TREATING, 504, 522

STANDING ORDERS ON PETITIONS, 314

STATEMENT,

of times and places of treating, 631

STATEMENT BY MEMBER,

of qualifying property, 551

STATUTE—see **ACT**,

when directory, or imperative, or prohibitory, 381

construction of, 523, 537

disobedience to, 380

STAYING THE WRIT OF SUMMONS, 385

STRANGER,

nominating candidate, 393

STRANGER—*continued*.
 corrupting voter, 437
 acts of, not binding, 565
 getting up election petition, 636, 637

SUB-AGENT,
 principal responsible for, 562, 568, 569, 578

SUBPŒNA DUCES TECUM, 615

SUBSCRIBER OF PETITION, 302, 314, 315
 proof of being, 332

SUDBURY CASE, 482

SUFFRAGE LOST,
 after conviction for bribery, 429, 435

SUMMONS, WRIT OF, 384

SUMMONS OF CHAIRMAN, 609
 when witness in custody, 609, 610
 service of, 618

SUNDAY, 295, 297

SUPERSEDEAS TO WRIT OF SUMMONS, 385

SURETY FOR COSTS, 292
 description of in recognizance, 292, 297
 affidavit by, 293
 entry of description of by examiner, 293
 objections to recognizance, 295
 in case of death of, 296

TAMPERING WITH WITNESS, 611

TAVISTOCK CASE, 556

TAXATION OF COSTS, 656

TAXING OFFICER, 656

TENANCY, CONTINUANCE OF, 598

TENDER OF VOTE, 347, 353, 359, 367
 proof of, 347
 error in recording, 378

TESTE OF WRIT, GIFTS AFTER, 426, 443, 506

TESTE OF WRIT, TREATING AFTER, 524

THETFORD CASE, 508

THREATS TO VOTERS, 411, 413

TICKETS FOR REFRESHMENT, 518, 528, 538, 547

TIME,
 for delivery of objections to recognizance, 295
 for hearing objections, 295, 297, 636
 for admitting voters to defend return, 308, 316
 for presenting petition, 315, 316
 for delivering lists of voters objected to, 327
 for requiring proof of petitioner's signature, 333, 339
 for impugning title of petitioner, 339, 636
 for proposing candidate, 394 to 398
 for opening and closing poll, 399 to 403.
 for corrupting voter, 437, 535
 bribery petition presented after, 489
 within which treating prohibited, 524, 535
 for demanding qualification of candidate, 550, 553
 when must be qualified, 554
 for service of warrant or order on witness, 618
 for service of notice to produce, 617
 for asking for costs, 631, 655
 for applying for costs to be taxed, 656

TITLE OF PETITIONER, 304 to 308
 required to be proved, 306, 337
 disqualified, 312
 allegation of, 335, *et seq.*
 proof of, 337
 time for impugning, 339, 340

TOWN AND COUNTY OF THE TOWN, 340

TOWN CLERK VOTING, 373

TOWN, TREATING, 525

TRANSLATION OF PETITION, 314

TRAVELLING EXPENSES, 437

TREATING, 375, 376, 498—502, 508
 definition of, 502
 misdemeanor, 503
 history of, 504—506
 cases of, 508—523, 538

TREATING—continued.

- disqualification from, 513, 517, 532
 - in order to be elected, 519, 521, 526
 - statutes as to, 524, 535
 - by candidate or on his behalf, 528—532, 535, *et seq.*
 - form of allegation of, in petition, 533, 536
 - for a corrupt purpose, 535—540
 - without the authority of candidate, 529, 540, 541, 543, 544
 - may be bribery, 543
 - proof of agency in case of, 531, 579
 - times and places of, to be stated, 631
- TREATING ACTS**, 426, 502, 506
- 7 Will. 3, c. 4.. 513, 517, 524
 - 5 & 6 Vict. c. 102 . 535
 - extension of, to Scotland and Ireland, 534, 536
- UNDER-SHERIFF**, 372, 579
- UNDUE ELECTION**, 303, 328, 412
- UNDUE INFLUENCES**, 412—417
- UNDUE RETURN**, 328, 329, 412
- UNFOUNDED ALLEGATION**, 299, 650
- UNFOUNDED CHARGE**, 650
- UPON SUCH ELECTION**,
- disability, 451—457, 463, 512, 532
- USAGE OF PAYING VOTERS**, 432
- VARYING NAME ON POLLING**, 378
- VEXATIOUS OBJECTION**,
- costs, 299, 650
- VEXATIOUS OPPOSITION**,
- costs on, 298, 649, *et seq.*
- VEXATIOUS OR CORRUPT ELECTION**,
- costs to petitioner, 299, 650
- VEXATIOUS OR CORRUPT RETURN**,
- costs to petitioner, 299, 650
- VEXATIOUS PETITION**,
- costs on, 298, 648, *et seq.*
- VICE-CHANCELLOR**, 343
- VIOLENCE AT ELECTION**, 400, *et seq.*

VIOLENCE TO VOTER, 368, 406

VOID ELECTION, 369, 412, 421, 424, 517, 648

VOID VOTES, 400, 424

VOTE.—See RIGHT TO VOTE.

VOTE BRIBED, 374, 424, 429, 435

VOTE, CLAIM TO RIGHT TO, 306, 333

VOTE OF BRIBER, 376, 438, 441

VOTE (Scotch),

- admitted or rejected by sheriff, 351
- tender of, rejected, 353

VOTER,

- frivolous or vexatious objection to, 299
- petitioner, 304
- defending return, 309, 316, 635
- description of, in objections, 324, 325
- evidence of qualification of, 341
- specially retained or inserted in register, 342
- expunged or omitted from register, 342, 350
- proof of tender of vote by, 347
- qualification of, not continuing, 360—363
- incapacity subsequent to registration, 365, 366
- personated, 367
- abducted, 368
- accepting office or employment, 370—374
- bribed, 374, 424, *et seq.*
- bribing, 376, 429, 441
- mistake by, in polling, 378
- candidate can be proposed only by a, 389
- may demand poll, 391
- obstructed from polling, 402—409
- menaced, 411, *et seq.*
- penalty on, for bribery, 429, 430, 431, 435
- treated with a corrupt purpose, 535
- demand of qualification of candidate by, 551, 553
- competent witness, 595, 596

VOTERS, LIST OF, 284, 309, 323

- objected to, 323, *et seq.*

VOTERS, LIST OF—continued.
 proposed to be added to, 323, 326
 to whom delivered, 324
 when not required, 326

VOTERS INTIMIDATED, 411, et seq.

VOTERS OBSTRUCTED BY RIOT, 402—409

VOTER'S MIND,
 evidence of corruption of, 435—438
 effect of treating on, 501

VOTERS, TREATING, 502, 518, 524, 535

VOTES THROWN AWAY, 388, 394, 467, 471, 475, 555, 559

VOTING—see RIGHT TO VOTE.
 a disqualification to serve on committees, 279
 on committee, 284, 285
 pending petition, 309
 under a corrupt influence, 374
 424, et seq., 535
 for person not nominated, 396
 if poll not opened or closed at right hours, 400
 obstruction to, 400, et seq.
 from intimidation, 411, et seq.
 for one candidate when bribed by another, 440
 for a disqualified person, 471, 475
 before signing declaration as to property qualification, 551

WAGERS, 437

WAIVER OF IRREGULARITY, 394

WAIVING POLL, 391

WANT OF REASONABLE OR PROBABLE GROUND, 652

WARRANT—see SPEAKER'S WARRANT.
 for committal of witness, 285
 for attendance of witness, 608, 609
 service of, 618

WATCHERS, 372, n.

WATERFORD CASE, 311

WAYS OR MEANS, 524, 528

WEYMOUTH CASE, 325

WIFE, WITNESS, 586

WITHDRAWAL OF CHARGE OF BRIBERY, 487—494

WITHDRAWAL OF MEMBER, 645

WITHDRAWAL OF PETITION, 298, 318, 488, 489, 653

WITHDRAWAL OF WITNESS, 603, 604, 619, 631

WILLS ACT, WITNESS, 586

WITNESS,
 power to send for and examine, 285, 488, 608, 609
 oath to, 285
 misconduct of, 285, 610, 611, 612
 examination of. in Ireland, 286
 revising barrister, 342—344
 Vice-Chancellor, 343
 president of a court of record, 343
 petitioner, 485, 591
 sitting member, 485, 591
 examination of, as to compromises, 488
 former law as to competency of, 581, 582
 statutes removing restrictions to admissibility of, 582—585
 who now competent, 585, 587, 590, 595
 who incompetent, 586, 587
 interested witness before committees, 587—591
 voter, 595, 596
 as to answering questions tending to criminate, 592—595, 612, 613
 the like, to disgrace, 595
 declaration of, 599
 examination of, 600, 618
 refreshing memory of, 601
 contradicting, 602, 603, 605
 cross-examination of, 603, 623
 withdrawing, 603, 604, 619
 impeaching credit of, 605
 evidence of a single, 606
 attendance of, how enforced, 608, 609, 614
 committal of, 609, 611
 expenses of, 610, 658
 giving false evidence, 610, 611
 prevaricating or refusing to give evidence, 610, 611

WITNESS—continued.

tampering with, 611
committee to determine propriety
of question to, 612, 613
production of documents by, with-
out being sworn, 615
ordering out of court, 620

WRIT AND RETURN,
what proved by, 622

WRIT OF SUMMONS, 384, 489
treating after teste of, 524

WRITTEN,
petition must be, 314

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